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Carl Johanson and Clara J. Johanson v. Cudahy Packing Company : Petition of Respondent for Rehearing and Supporting Brief

Utah Supreme Court

Mahlon E. Wilson; Robert C. Wilson; Attorneys for Respondent;

6302

In the Supreme Court
Of the State of Utah

CARL JOHANSON and CLARA J. JOHANSON, his wife,
Plaintiffs and Appellants,

vs.

CUDAHY PACKING COMPANY,
Defendant and Respondent.

Case No.
6302

PETITION OF RESPONDENT FOR REHEARING AND SUPPORTING BRIEF

Appeal from the Third Judicial District Court of
Salt Lake County
Honorable M. J. Bronson, Judge

MAHLON E. WILSON,
ROBERT C. WILSON,
Attorneys for Respondent.

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The Cudahy Packing Company, respondent in the above entitled cause, hereby respectfully petitions this Court to rehear and reconsider the questions of law involved in the case at bar for the reasons hereinafter stated. In making such petition attention is called to the fact that by statute it is made the duty of the Court that whenever a cause is remanded for a new trial in the District Court, this Court shall pass upon and determine all questions of law involved in the case presented upon appeal and necessary to a final determination of the case. (Section 104-41-23, R. S. U., 1933.)

Although four written opinions were delivered by the justices of this court on this appeal, it is believed by the counsel who presents this petition that it cannot as yet be determined with certainty whether the insurance carrier shall be limited in its recovery, if recovery is

allowed, to the amount which it actually paid to the dependents of the deceased servant, or whether it shall be permitted to recover, if recovery is allowed, damages in excess of the compensation awarded and paid to the dependents.

In seeking the reconsideration applied for the respondent contends:

1. That the subrogation of the insurance carrier provided for in Section 42-1-58, Revised Statutes of Utah, 1933, takes place by operation of law, and is not dependent on contract or privity. It is not an assignment nor is it synonymous therewith, and therefore the statute conferring the right of subrogation upon the insurance carrier did not make the cause assignable to the insurance carrier; nor did it open the door to general assignability. (71 Utah 112.) (138 U. S. 595.)

2. The right of the insurance carrier to recover damages from the tort-feasor, a stranger to the employment, created by Section 42-1-58, Revised Statutes of Utah, 1933, cannot be classified as a right of property capable of inheritance. Rather it is one strictly personal in its nature, the existence of which will not survive either the death of the wrongdoer or the death of its owner. This right of action to which the self-insuring master or the insurance carrier of that master is by statute subrogated cannot survive for or against the estates of deceased persons under any provision that can be found in Utah's Survival Statutes, Sections 102-11-5, 102-11-6 and 102-11-7.

It is not an action for the "recovery of any property, real or personal," nor is it an action for "wasting, destroying, taking or converting the goods of another person," nor is it an "action founded upon contract." (263 Pac. 78.) The wrong of the tort-feasor, if wrong there was, was *delictual* in character. It was a violation on his part of some duty imposed upon him by law, *not by contract.* The right to recover for such wrong never has been assignable in this state except for the period intervening between July 1, 1921, and June 26, 1933, on which last named date the legislature expressly repealed the provision making causes of action for either injury or death assignable. (See amendment—1939.)

3. Assuming for the purpose of argument the subrogation of the insurance carrier to a property right (one capable of inheritance) to recover from the tort-feasor, a stranger to the employment, the amount of the compensation award made and paid by the insurance carrier, then the right claimed in the complaint in this particular case is *not that property right.* The right claimed by the plaintiffs in this case is the right which the dependents of Johanson might have had to sue for wrongful death if such dependents had not applied for and been awarded compensation. Plaintiffs cannot change their theory on appeal, and when the plaintiffs cannot and have not, this Court is without power to change such theory. A decision authorizing insurance carrier to recover on the theory that it has a property right for reimbursement of amount paid by it is in direct antagonism to the theory of the complaint in the case at bar.

4. Assuming for the purpose of argument that the statute provides for the subrogation of the insurance carrier to a property right, i. e. one capable of inheritance, then that subrogation by the very terms of the statute is not complete, and for that reason not actionable until the insurance carrier has paid in full the amount of the compensation award. Until the subrogation of the insurance carrier is complete, until its title to the so-called "property right" vests, no valid assignment of such right can be made. "It is contrary to rational thought to say that a suit can be maintained upon the assignment of a nonexistent thing." (275 Fed. 333.)

5. Because it affirmatively appears of record that the Trial Court, upon sustaining the demurrer of the defendant, allowed plaintiffs ten days within which to amend their complaint, and the plaintiffs by their attorneys in open court *declined this right to amend and refused to plead further and elected to stand upon the complaint of the plaintiffs,* and because that complaint was "insufficient as against a general demurrer," (quoting Mr. Justice Pratt), then the Trial Court committed no error in entering judgment for the defendant; and because no error was assigned by the appellants, or could have been assigned, (that the Trial Court erred in not allowing the plaintiffs to amend), then this Court has no power on appeal to reverse the judgment of the Trial Court on that ground. Errors not assigned cannot be reviewed. Errors not made by the court and therefore not assigned by appellants cannot be reviewed. When a demurrer to a complaint is sustained and the com-

plainant declines to amend, the Trial Court cannot do otherwise than render judgment for the defendant. If the ruling of the Trial Court is right, even though the reasons given for that ruling are wrong, the judgment must be affirmed. "This Court can help only one who helps himself." (164 Pac. 1052.) The plaintiffs have never yet withdrawn their refusal to amend. The actual facts as shown by the award of compensation made by the Industrial Commission on August 22, 1938, make it apparent that the award of compensation has not been paid and cannot be paid until June 3, 1944.

6. The order of this Court allowing costs to appellants is against law. It is obviously a mistake by the Court. On what theory can costs of appeal be allowed against the respondent? The mistake, if mistake there was, was that of the appellants, but there was no mistake. The appellants filed the complaint they intended to file and alleged therein what they intended to allege. Under existing facts they could not allege payment of award.

In the brief that follows, the respondent will argue and undertake to support by authorities each of the foregoing propositions.

MAHLON E. WILSON,
ROBERT C. WILSON,
Attorneys for Respondent.

CERTIFICATE OF COUNSEL

And now comes Mahlon E. Wilson and hereby certifies that he is the attorney for the defendant in the above entitled cause; that he has prepared the foregoing petition for rehearing and its supporting brief; and he further certifies that in his opinion there is good reason to believe that the judgment and decision made by this Court and objected to by the respondent herein is erroneous, and that the cause ought to be re-examined and reconsidered by this Court.

MAHLON E. WILSON

BRIEF AND ARGUMENT
FOREWORD

The rule of the Common law to the effect that in a civil court the death of a human being cannot be complained of as an injury may be anomalous to a scientific jurist, but it is explicable on historical grounds. This statement has been obtained from the opinion rendered by Lord Parker in the case of Admiralty Commissioners vs. Steamship America, A. C. 38, Ann. Cas. 1917B, 877 (1917). Referring to an early criticism made by Lord Bramwell, Lord Parker said:

> "It was, he considered, anomalous that a master should be entitled to recover for loss of service if his servant were wrongfully injured, but should be without any remedy if his servant were wrongfully killed. If it were any part of the functions of this House to consider what rules ought to prevail in a logical and scientific system of jurisprudence, much might no doubt be said for this criticism; though it is not, in my opinion, by any means clear that the anomaly does not in reality consist rather in granting the remedy in the former case than in refusing it in the latter. In a society based so largely as our own is at the present day upon contractual obligations, it does not appear why the wrongful injury of A, whereby he is prevented from fullfilling his contractual obligations to B, should confer on B a right of action only where these obligations are those arising out of the relationship of master and servant, or, indeed, why the right should not be extended so as to cover all loss, whether arising out of inability to perform a contract or otherwise." (Ann. Cas. 1917B, 878.)

Lord Sumner also rendered an opinion in deciding the case above cited. In the course of that opinion he among other things said:

> "Mr. Solicitor urged that such a principle is highly technical and that, if a minor hurt to a servant gives a cause of action to a master, a fortiori must the major hurt which results fatally, and he reminded your Lordships that this House in the case of Mills vs. Armstrong (1888) 13 App. Cas. (Eng.) 1, overruled Thorogood vs. Bryan (1849) 8 C. B. 115, 65 E. C. L. 114, a case of long standing, and exhorted your Lordships to take heart and do likewise. This is hardly the right view to take of your Lordships' judicial functions nowadays, nor does it follow in the case of a legal system such as ours, that a principle can be said to be truly a part of the law merely because it would be a more perfect expression of imperfect rules, which, though imperfect, are well established and well defined. Again, an established rule does not beccome questionable merely because different conjectural justifications of it have been offered, or because none is forthcoming that is not fanciful." (Ann. Cas. 1917B, 884.)

And again on Page 885 he said:

> "There never was an action to recover damages for the death of a human being in the sense now contended for, and the remedy by appeal which so long persisted in the case of the widow, the most crying case of all, was one which the most hardened formalist would not have tolerated, had any such action at law been possible, for it was long a form of legalized blackmail.

> The historical explanation of the absence of such an action at the suit of relatives applies equally to the case of a master's claim for the death of a member of his familia, for example, a servant. It is equally incapable of judicial creation. Indeed, what is anomalous about the action per quod servitium amisit is not that it does not extend to the loss of service in the event of the servant being killed, but that it should exist at all. It appears to be a survival from the time when service was a status."

Referring to the maxim actio personalis moritur cum persona, Lord Sumner said:

> "If, however, this maxim is put aside, since in the present case it is irrelevant, I think that the argument that your Lordships should discover under this ancient form of action some principle hitherto undetected is really an appeal to this House in its legislative and not in its judicial capacity."

The facts of the case just cited may be stated as follows: It was conceded that in the year 1912 the Steamship America collided with a submarine belonging to the English government; that the America was alone to blame for the collision. As a result of that collision the submarine was lost, and except for one officer, all of its crew, consisting of an officer and fifteen sailors of the Royal Navy, were drowned. Among the items of damage claimed by the United Kingdom was a sum of 5140 English Pounds, or approximately $25,000, representing the capitalized amount of pensions and grants payable to the relatives of the men who were drowned.

These pensions and allowances were granted under statutory authority according to authorized scales. The question involved was the right of the English government to obtain indemnity from the owners of the offending steamship for the amount of pensions which, pursuant to act of Parliament, England was compelled to pay to the relatives of the sixteen men who were drowned by reason of the conceded negligent act.

It was held:

> "that a person who negligently caused the sinking of a naval vessel, and the death of the sailors thereon, was liable to the Crown for the value of the vessel but not for the value of the pensions paid by the Crown to the dependents of the deceased." (Ann. Cas. 1917B, 887.)

The decision of the House of Lords, rendered December 19, 1916, denying liability, compels the admiration of every man who believes in the principles of constitutional government as contradistinguished from arbitrary and capricious action. The attitude of these English jurists, as particularly expressed by Lord Sumner when he distinguishes between the legislative and judicial capacity of the House of Lords, has been the bulwark of the judicial systems of England and America. Neither England nor America as such can long survive if that bulwark is destroyed.

In America the courts have no legislative capacity, and whenever an American judge exercises such a capacity he usurps a power that he does not possess.

This English case has been quoted from in this foreword to this brief for the purpose of emphasizing the duty of the bar as well as the bench. The disposition to legislate is constant, but it should be resisted and destroyed. A study of the case must yield benefit to the mind of every person who is interested in the history of the law controlling the relation of master and servant, which was in the beginning one of status but has now become one of contract.

At common law the master was entitled to recover for a loss of service if his servant was wrongfully injured, but that master was without remedy if his servant was wrongfully killed. The remedy *for the injury* did not survive the death of either the wrongdoer or the master, and therefore it was not assignable. No question could arise relative to the survivability or assignability of the master's claim for the death of his servant because the master had no claim.

Whether the law should provide that any person sustaining pecuniary loss by reason of the wrongful death of another person should have a right of recovery against the wrongdoer is a legislative and not a judicial problem. The enactment of such a law would result in consequences tremendous in their character. It is submitted, however, that no greater reason can exist for a recovery from a wrongdoer by an insurance carrier of the amount that it has been required to pay to satisfy an award of compensation for the death of a servant than for a recovery from a wrongdoer by a life insurance company of the amount that it has been required to pay

to satisfy a claim for the death of the insured. The death is the principal event in both cases. To assert that it is a mere incident in either is a denial of that which is obvious. Both contracts of insurance are indemnifying in their natures. The liability insurance company pays a loss sustained by the dependents of the deceased servant, the amount of which is determined by applying the standards prescribed by the Compensation Act. The life insurance company pays an amount fixed by agreement at the time the contract of insurance is made. There is no reason why the amount of the loss cannot be agreed upon in advance of injury as well as thereafter. In ordinary life insurance the insurer and insured in effect fix the value of the insured's life in the contract and at the time of the contract. The amounts of premium paid are dependent upon the fixed value of the life of the insured.

Neither of these contracts is of a wagering character unless they are for the benefit of persons who have no insurable interest in the life of the insured; unless they are for the benefit of persons who have a greater interest in the death of the insured than in a continuance of his life. Such contracts are void ab initio.

If the death of the insured, employed or unemployed, is caused by the act of a third person, i. e. a stranger to the contract of employment or to the contract of insurance, then the act is wrongful only if the person who commits it violates some civil duty imposed upon him, not by contract, but by law. The wrongful act may constitute murder and yet it cannot create a civil cause of

action unless a civil remedy in favor of some person has been created by statute. In the absence of such statute no one has a civil cause of action.

A judicial controversy or even a private quarrel cannot exist without at least two adversaries. A contract requires two parties. A cause of action requires a plaintiff who has a civil remedy, and when he has, a right exists. There must be a violation of that right by the defendant. The idea that a tort can be committed by one without *legally* injuring another is a real absurdity. Blind men cannot see; oceans do not burn, and causes of action cannot exist independent and apart from some person possessed of a remedy for the enforcement of such causes.

The established rule is that no one can exercise a statutory remedy unless he comes within the statute. The English Crown in the case cited was not a beneficiary in Lord Campbell's Act, and as a result the English Crown had no cause of action.

The insurance plaintiff in the Brame case was not within the Louisiana death statute, and as a result the insurance company stated no cause of action. (95 U. S. 754; 24 L. Ed. 580.)

The heirs of Charles Thorpe, deceased, were not within the Wyoming statute, and as a result their complaint stated no cause of action. (24 Utah, 476; 68 Pac. 145.)

The Brame case well illustrates the point. The insurance company, as plaintiff, alleged that Brame had fel-

oniously killed McLemore; that McLemore's death had caused a pecuniary loss of $7000 to the insurance company. It was plainly alleged that Brame had done wrong; that he had committed murder, but his violation of law did not create cause of action in favor of the plaintiff insurance company, because the plaintiff was not given any remedy in the death statute and had no remedy at common law. McLemore in his lifetime could have made contracts without number. His death would have prevented performance and caused great pecuniary loss, but a tort-feasor who kills another incurs no liability to persons contracting with or employed by the deceased unless the wrongful act is done to another with malicious intent to injure him by destroying his contract relation. (Nothing of the kind involved here.)

> Connecticut Mutual Life Ins. Co. vs. N. Y. N. H. & Hartford R. R. Co., 25 Conn. 293; 65 Am. Dec. 571 (1856).

No one can successfully dispute the power of a state legislature to enact a law which would change these rules and make liable defendants who had acted as Brame was charged to have acted, but the liability of the defendant, if imposed by statute, could not be otherwise than delictual in character. Such a statute would not change that in the slightest particular. The statute would provide a remedy to an insurance company and a consequent right. The measure of damages would be fixed at the amount of the insurance paid. Availing itself of such a statute, the insurance company would be enforcing its own cause of action. That cause of action would not be

based on a property right, i. e. one capable of inheritance. Why, if not because of the character of the wrong done by a Brame? The wrongful act would be a personal tort. The natural death, or even the suicide, of either the plaintiff or the defendant would destroy the existence of that right. (Of course the statute could change the rule as to survivability.) The remedy would not be available for litigation against the estate of the defendant in the absence of statute.

In order to find a property right it is necessary that the remedy for its enforcement shall pass to the estate of the person injured, and that the liability of the wrongdoer shall at his death become a liability of his estate. Whenever that which was a personal right is made assignable by statute without qualification, then, of course, such right becomes property, capable of inheritance; but when its assignability is limited to a particular person as assignee, then the thing assigned is still personal.

> Bates vs. Sylvester, 205 Mo. 493; 104 S. W. 73; 120 Am. St. 761 (1907). See this case.)

These observations are made to be used as general principles in a consideration of the discussion of the specific points made in the petition for rehearing. The contentions are six in number, Contentions 1, 2, 3 and 4 involve the meaning of Utah's Compensation Act, particularly Section 42-1-58, Revised Statutes of Utah, 1933. Robert Johanson, the deceased, met his death on June 3, 1938. On that date Section 42-1-58 read as follows:

> "42-1-58. Id. WRONGFUL ACT OF THIRD PERSONS—SUBROGATION. When

any injury for which compensation is payable under this title shall have been caused by the wrongful act of a third person, the injured employee, or in case of death his dependents, may at their option claim compensation under this title or have their action for damages against such third person; and, if compensation is claimed and awarded, the employer or insurance carrier having paid the compensation shall be subrogated to the rights of such employee or his dependents to recover against such third person; *provided,* if such recovery shall be in excess of the amount of the compensation awarded and paid, then such excess, less the reasonable expenses of the action, shall be paid to the employee or his dependents. (L. 21, p. 165, Sec. 3133.)

CONTENTION NO. 1
THE SUBROGATION OF THE INSURANCE CARRIER BY THE STATUTE WAS NOT ASSIGNMENT

It has been held in this case in the opinion written by Mr. Justice Pratt and concurred in by Chief Justice Moffat, "that the cause of action under Section 42-1-58 in favor of the insurance carrier may be assigned." This decision is based upon the ground that the cause of action is considered "in the nature of a property right," "one which should survive to the successor of the insurance carrier the same as any other cause in the nature of a property right."

In a separate opinion concurring in the result, Mr. Justice Wolfe held that because Section 42-1-58 subrogated the employer or insurance carrier which paid the

compensation to the rights of the injured employee or his dependents in case of death, to recover against the third person, the cause of action had been made assignable by that section of the statute; that such statute, having made an ex delicto action assignable to the party paying the compensation, had the legal effect of opening the door completely to general assignability. (In other words a license granted to one, is a license to all.)

Mr. Justice Larson, concurring in part and dissenting in part, held that the right to recover damages to which the insurance carrier had been subrogated was not assignable.

Mr. Justice McDonough dissenting, held that such right was not assignable.

Two of the justices held that the judgment of the District Court should be affirmed; two of the justices held that "the complaint was insufficient as against a general demurrer since it does not contain an allegation that the insurance carrier has paid the award." The other justice in effect held that the payment of the award by the insurance carrier was a "condition precedent" to obtaining title to the cause of action; that such cause of action or cause for the action is the negligent killing of the employee.

The right of the plaintiffs to maintain this action cannot be sustained if the cause of action for which recovery is sought was not assignable. Assignability of a cause of action presupposses the existence of the subject of the assignment at the time such assignment was made. A want of assignability may exist (a) because of

the general nature of the action, or (b) because of the non-existence of any cause of action. If the insurance carrier did not have vested in it a cause of action at the time of the assignment, then, of course, the assignment relied upon in the complaint cannot be otherwise than a nullity.

By Section 42-1-58 above quoted it is in effect provided that if the death of a servant protected by the Workmen's Compensation Act is caused by the wrongful act of some stranger to the employment, the dependants of that servant are given by the statute one of two alternative remedies, and consequently one of two alternative rights. To obtain the first remedy, viz.: that of compensation, was the chief purpose of the Workmen's Compensation Act. It consists in the dependents applying for and having awarded to them compensation as against the master for whom the servant was working at the time of his injury which resulted in death. By providing this remedy, then the legislature under the Constitution, Article XVI, Sec. 5, as amended in 1920, had the power to abrogate entirely the right to recover damages for injuries resulting in death.

Halling vs. Industrial Commission, 71 Utah, 112; 263 Pac. 78 (1927).

But the legislature, within its lawful power, gave the dependents of the deceased servant the right to elect and take a second remedy. If these dependents did not elect to take the first remedy and pursue it to the point of obtaining an award of compensation against the master, then the statute provided this second remedy, viz: these dependents might have their action for damag-

es against the stranger who wrongfully caused the death of the servant.

These two remedies are disjunctive—not conjunctive. They are alternative. If the dependents elect to take compensation and obtain an award, as it is alleged they did in the case at bar, then they *never became vested with or acquired any right to have an action for damages against the stranger* who wrongfully caused the death of the servant. The dependents became vested with the right of choosing one of two remedies, but until the choice was made no right to either existed or was vested. When the dependents claimed and were awarded compensation, then they had no further interest in the matter except to recover their compensation either in a lump, if so awarded, or in periodic payments, if so awarded. The right to recover the damages sustained by them because of the death of the servant against the third person never became their right because they claimed and had awarded to them the compensation provided for by the Act. The taking of compensation, which was certain and inexpensive to obtain, precluded the taking of the right to recover damages from the third person.

In the case at bar it is alleged in the complaint that the dependents voluntarily applied for and obtained an award against the master. The risk of that master was carried by the London Guarantee & Accident Company, Ltd., hereinafter called the insurance carrier. The statutes provides:

> "if compensation is claimed and awarded, the employer or insurance carrier having paid the

compensation shall be subrogated to the rights of such employee or his dependents to recover against such third person." (It then has a provision relative to the distribution of the amount of recovery, if any, the effect of which will be hereafter explained.)

The right to recover damages which the dependents might have taken but did not take did not become existent as a cause of action *until the insurance carrier paid the full amount of the compensation award.* Between the time of the award of compensation and the payment of that award by the insurance carrier, it was a pure fiction. In view of the fact that the dependents were compelled to elect as between compensation from the master or damages from the stranger whose wrongful act had caused the death of the servant, and that such dependents were not allowed to have both of these remedies, or, rather, were allowed to have only one of such remedies, it can be said with absolute accuracy that the Johansons in this case never became possessed with any right to recover damages against the stranger or third person. It would be an absurdity to assert that because the dependents declined the remedy of recovery against the third person, therefore the insurance carrier was made an assignee of a non-existent right.

Some effect must be given to the provision under consideration, and therefore it should be read:: "The insurance carrier having paid the compensation, shall be subrogated to whatever rights the dependents would have had to recover against such third person if such dependents had not applied for and had not claimed and obtained an award of compensation." These and these

only are the rights of the insurance carrier as they are provided in this statute. At the time of the death of the servant they came into existence as available remedies resulting in inchoate rights. The dependents, if they so elected, could have such rights in themselves, but if such dependents claimed and obtained an award of compensation against the master, then the rights to recover damages against the third person never vested and could not vest in the dependents. If the award of compensation was made in favor of the dependents and against the master, the latter's insurance carrier could have the rights to *recover damages from the third person vest in that carrier only by paying in full the amount of compensation awarded in favor of the dependents and against the master.*

What is Subrogation? It has been defined as the substitution of another person in the place of the creditor to whose rights he succeeds in relation to the debt. The facts in the case at bar do not fit into this definition except by applying the terms of the statute. Subrogation is a legal fiction by a force of which an obligation extinguished by payment made by a third person is considered as continuing to subsist for the benefit of that person who paid the obligation.

Now, what is the obligation to be paid, applying Section 42-1-58? The award of compensation in this case is $31.16 every four weeks for a period of six years from June 4, 1938.

The Award: It is like unto a judgment payable in periodic future installments, payment to cease on a fixed date. (e. g. judgment for alimony.) It is actually (no

fiction here) subsisting as a right of dependents and as an obligation of the insurance carrier, which obligation arises out of the contract of insurance with master. If all of the dependents should die, with all sums due at the date of death fully paid, but with installments still unpaid because not yet due, would the right to such installments be the subject of inheritance by the heirs of the dependents? (135 Am. St. 775.)

See also Hunt vs. Monroe, 32 Utah, 428; 91 Pac. 269 (1907).

(A decree for alimony or maintenance, payable in the future in periodic installments, is not a judicial debt of record.)

To What is the Insurance Company Subrogated? The right to recover damages from the wrongdoer is still a "bird in the bush"—not a "bird in hand." (This figure is used in 135 Am. St. 775.) It is considered as subsisting as a right to the dependents to recover damages from the tort-feasor for the negligent killing of the servant. This consideration of such right is fictional because the dependents never possessed that right. When the award is *made,* this right is no longer available for choice by the dependents, but when the award is *paid* by the insurance carrier, then, *and not till then, the* insurance carrier becomes vested with that right to recover damages from the wrongdoer. That right then becomes a "bird in hand" of the insurance carrier. The award is actually gone. All rights of dependents have been satisfied and discharged.

The fiction commences to function as to the award. It is still considered as subsisting but only for the pur-

poses (a) of giving a right to the insurance carrier to recover a judgment for damages against the wrongdoer, and (b) measuring the extent of the insurance carrier's rights in the judgment when and if one is recovered by the carrier against the wrongdoer. The action (call it security or what not) against the wrongdoer is ex delicto in character from the date of the accident until it is merged into a judgment. It is for a tort and is a personal right protected by the Constitution when once vested, not amenable to execution or bankruptcy *and not a subject of inheritance.*

The Judgment; Its Amount; Distribution of Its Proceeds: The judgment is property. The proceeds realized from the judgment are to be distributed, first to reimburse the insurance carrier for the amount of compensation awarded and paid. (If because of a death of *some of the dependents* the carrier should be relieved from paying the full amount of the award, or a part of that award abated, then, of course, the extent of the reimbursement would be reduced to the amount paid. The extent of recovery from the wrongdoer by the insurance carrier would likewise be reduced.) The excess remaining after reimbursement of carrier, less the reasonable expenses of the action, is then paid to the dependents. If either *all* of the dependents die or the wrongdoer dies prior to judgment the action for damages ceases to exist. (120 Am. St. 761.)

Too often in a consideration of these questions one is inclined to overlook the effect of the death of the wrongdoer.

Brown vs. Wightman, 47 Utah 31; 151 Pac. 366; L. R. A. 1916A, 1140 (1015).

Clark vs. Goodwin, Adm., 170 Cal. 327; 150 Pac. 357; L. R. A. 1916A, 1142 (1915).

Each of these two cases involves the death of the wrongdoer. (It is a fact that the author of the Utah opinion collaborated with the author of the California opinion before either of said opinions were rendered.)

The fact that the dependents of the deceased servant may have paid to them an excess upon the distribution of the proceeds of the judgment is not to be construed as meaning that they have any interest in the action. On the other hand, such excess so paid should not be considered as a gratuity from either the self-insuring master or the insurance carrier or the wrongdoer. The self-insuring master or the insurance carrier is reimbursed to the extent of all sums paid out to satisfy the award of compensation. In addition to these sums the master or insurance carrier is allowed costs expended, counsel fees and all reasonable expenses incurred and paid in the prosecution of the action against the wrongdoer. Any further sums, if received by either the master or insurance carrier, would be profit from a source that should not yield profit. Public policy would condemn the taking of such profit.

Brown vs. Southern Ry., 204 N. C. 668; 169 S. E. 419 (1933).

In this North Carolina case the court held:

> "When the employer seeks to recover the amount paid by him from such third party his

> hands ought not to have the blood of the dead or injured workman upon them when he thus invokes the impartial powers and processes of the law.

It also said:

> "If it be conceded that I was negligent, you were also guilty of negligence. If I killed the deceased, you participated actively in the killing. Sound public policy, sanctioned and adopted by the decisions of the Supreme Court, forbids you to profit by your own wrong to pluck good fruit from the evil tree of your planting."

What this North Carolina Court said relative to the disputed question of the effect of the contributory negligence of the employer cannot occasion very much dispute relative to the distribution of the proceeds of the judgment.

Take the other side of the problem. The wrongdoer should not be required to pay any greater amount of damage than that actually sustained by the dependents. Their damage should be limited by the extent of the dependency. It is not believed that the measure of damages applicable to Section 104-3-11, where companionship is an element, can be the measure of damages in an action prosecuted by the dependents under Section 42-1-58.

The right to compensation under the Compensation Act is given to those who are actually dependent on the deceased. That they were not legal heirs of the deceased is of no consequence, but "the statute was not designed as a city of refuge for the negligent third party." (Brown vs. Southern Ry., supra.) If that third party, the tort-feasor, should not pay greater damages than

those actually sustained, such tort-feasor should not pay less than such amount; otherwise, he will profit by his wrong. He is not required to pay *compensation* because he injured or killed a servant. His liability rests on his fault. He should not get a benefit from the Compensation Act unless he is brought under that Act. (Some states have acts binding the third person as well as the master.) The same public policy which condemns profit by insurance carrier or master condemns profit by a wrongdoer.

The excess remains, not necessarily in every case—perhaps not in this one; perhaps not in the case at bar, because the compensation awarded was limited to approximately $2500. In some cases like the Parramore case, one feature of which was presented by the writer of this brief acting as counsel for the Cudahy Packing Company, the damages, if any had been recovered, might well have been $10,000 or more, whereas, the compensation which had been awarded by the Industrial Commission of this state was approximately $5250, because that amount was the maximum that could under the law be awarded by the Industrial Commission.

Justice does not permit the excess to be obtained and kept by either the master or the insurance carrier, nor does it permit that excess to be retained and kept by the wrongdoer. By verdict and judgment the determination may be that the dependents of the deceased servant have sustained a loss because of the wrongful killing in a sum equal not only to the compensation award but *greatly in excess thereof.* To pay such excess, less the reasonable expenses of the action, to the dependents

does not constitute a gratuity unless doing justice is a gratuity. By these means outlined in the statute the dependents get only the amount of their loss. It is submitted that they should not get less.

Why General Assignability Should not be Permitted: These Workmen's Compensation Acts were designed primarily for the protection of those who labor and their dependents. To secure their protection and the protection of the public in general there should not be adopted even by a legislature, let alone by judicial construction, unless such construction is required, any system that will encourage or promote a traffic in these rights protected by this Act. If the door is opened "completely to general assignability," the compensation itself may be used for purposes of speculation in the outcome of personal injury suits. The law should never open its doors to such an extent as to create opportunities for fraud or legalized chicanery, and one of the evils that caused the enactment of Workmen's Compensation Acts was the somewhat general belief that the prosecution of the personal injury suit had become analogous to what is called a "racket."

By these observations the writer of this brief does not intend to cast the slightest reflection upon the counsel who represent the plaintiffs in the case at bar, nor does he intend to refer to any person in particular. He has no knowledge of the contract between the insurance company and the plaintiffs in the case at bar. He does submit, however, that before assignments are permitted by any statute, such assignments should be submitted to the Industrial Commission and allowed to

function only with its approval. These observations are made merely for the purpose of suggesting that there still exist sound reasons for the rules of law that prohibit assignability. *Man has not yet attained unto Nirvana.*

The Statutes Requires Full Payment of Compensation Award: Taking this language from one of the opinions, "allegations must be contained in the complaint showing that the insurer has performed those conditions precedent to obtaining title to the cause of action" as absolutely sound, the conclusion must follow that the insurance carrier must prove that it has fully paid the award before the insurance carrier can become vested with the right to recover damages from the wrongdoer. This right to recover damages is in the language of the Ohio Court, used with reference to the death action, "a bird in the bush"; it is in an embryonic and inchoate state, and that condition continues until the insurance carrier has paid the amount of the compensation award.

The words "having paid the compensation" must mean payment in full; otherwise such words mean "obligated to pay" or "liable to pay," and mean nothing so far as payment is concerned. (Many states have statutes using the words "liable to pay.") If the words "having paid the compensation" mean nothing more than "liable to pay" so far as payment is concerned, then such words mean nothing. Such a construction eliminates from the statute the words "having paid the compensation." To strike them from the statute is a legislative function. To give them force suspends the "birth" of the action in this case for a period of six years from

the date of Johanson's death, June 3, 1938. To say that these words mean "payment on account," as one of the opinions in this case seems to indicate, is only in a slight degree less objectionable from a judicial standpoint than to ignore the element of payment entirely.

> "Payment is the extinguishment of the claim."

Binford vs. Adams, 104 Ind. 41; 3 N. E. 753 (1885).

> "Prima facie the word 'paid' indicates that the obligation has been satisfied and the demand extinguished."

Lynds vs. Van Valkenburgh, 77 Kan. 24; 93 Pac. 615 (1908).

For anyone to assert, as the plaintiffs did in their brief, that the compensation has been paid (appellants' brief, P. 13.) is to ignore the complaint. Such an assertion is at war with the award of the Commission, a certified copy of which is hereto attached. Part payment is not payment. To be liable for payment is one thing, whereas, actual payment is another. In cases where the periodic payments required by the award extend out over a longer period, it is true that the "birth" of the action is long delayed.

But, as was said by the Illinois Supreme Court, 308 Ill. 322; 138 N. E. 658, this dilemma, if one there is, is one created by the legislature and "the remedy lies with the legislature. We do not see how we can give the statute the construction contended for by appellant without resorting to legislation ourselves."

It is not unreasonable to believe that the Utah legislature was making an effort at a legislative recognition of the principle of equitable subrogation, which generally requires full payment before there can come about any subrogation. (182 Cal. 140; 187 Pac. 735 (1920). In any event, upon full payment, and not until then, the insurance carrier became vested with the right to recover against the third person, the tort-feasor. How that cause can be assignable before it comes into existence, or how its assignment can accelerate its "birth" is not susceptible of rational explanation. (275 Fed. 333.)

If "it is payment of the award that gives birth to the carrier's rights," then without the payment of that award the carrier would have no rights either to enforce or *assign*. If this is a suit to recover "property —money—expenditure and not in tort," then indeed has a discovery been made of a principle hitherto unknown, except perhaps in the bayou of Louisiana.

Foster Co. Ltd. vs. Knight Bros., 152 La. 596; 93 So. 913 (1922).

> "An employer upon paying compensation for injuries to an employe sustained through the fault and negligence of a third person has two causes of action, one by way of subrogation and on behalf of the employe under Workmen's Compensation Law, Sec. 7, and the other for indemnification as on implied or quasi contract for reimbursement for the money it was compelled to pay on account of the third person's fault." (Par. 2 syllabi.)

It was also held that the cause of action for indemnification was contractual in character and existed inde-

pendent of statute. It turned out in this Foster case that the action for the reimbursement of the money paid because of the fault of the defendant was not barred by the Louisiana statute of limitations, but in and so far as the demand exceeded the sum alleged to have been paid by plaintiffs, it was barred by the statute of limitations.

This case leads to the inquiry relative to the common counts as they existed at common law and as they are still used in many states, including Utah. There were four at common law, all growing out of the action of assumpsit. That which came to be called, "indebitatus assumpsit" absorbed quantum meruit and quantum valebat, leaving only what is called our action on an account stated remaining. To maintain assumpsit it is necessary that there should be a contract, either express or implied. There is special assumpsit and there is general assumpsit. To state a case in special assumpsit one of the prime essentials is a promise made by the defendant. In general assumpsit, in the early part of the ~~sixteenth~~ 17th century it was held that a promise to pay might be inferred from the fact that the defendant had been enriched or benefited. This kind of assumpsit was nothing more or less than the old action of debt which had existed for centuries prior to the Statute of Westminster, 1285. It was the emolument of one party at the expense of the other, and from this emolument the law implied a promise, and this promise was nothing but a remedial fiction.

Keigwin Cases Common Law Pleading, P. 190.

Now the question has been decided time and again about waiving a tort and suing in assumpsit. If A

should take B's automobile and sell it, B could waive the conversion and sue for money had and received and recover the price which the wrongdoer obtained for the automobile. This upon the theory that A had been unjustly enriched to the extent of the amount of money that he received for the automobile which he originally converted. If A received money from B the law would imply a promise on his part to repay the money so received because he was unjustly enriched. If he received goods and chattels from B, he was unjustly enriched to the extent of their value. If at his request B paid out money on his account, he was unjustly enriched to the extent of the money paid out, but it is not the law that a right of action in contract can be created by waiving a tort, such as negligent injury or killing of a servant. "*You cannot obtain an implied promise from a duty to pay damages.*" The implied or fictional promise comes only from unjust enrichment of the defendant.

Bigby vs. United States, 188 U. S. 400; 47 L. Ed. 519 (1903).

Bigby brought suit in the Court of Claims to recover damages sustained by him from the negligent management of an elevator in a public building. The Court of Claims had jurisdiction of claims founded upon contract, express or implied, with the government, or for damages "in cases not sounding in tort." To make his case one of contract the plaintiff alleged that he had entered the elevator at the request of the government's agent and that thereupon the defendant entered into an implied contract whereby, for a valuable consideration, it agreed to manage the elevator with due care and to carry the

plaintiff safely. On demurrer to the petition it was held that it did not state a case within the jurisdiction of the Court, but one essentially in tort.

Mr. Justice Harlan, speaking for a unanimous court, said among other things:

> "Causing harm by negligence is a tort. One of the definitions of a tort is an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence have foreseen and prevented." Pollock on Torts, 1, 19.

And again he said:

> "It is a case sounding in tort because it had its origin in and is founded on the wrongful and negligent act of the elevator manager. There is in it no element of contract as between the plaintiff and the government."

Justice Harlan quoted from the case of Cooper vs. Cooper, 147 Mass. 370; 17 N. E. 892, 894 (1888). In this Cooper case a man falsely pretending that he was unmarried, induced the plaintiff to marry him and live with him as his wife. After this man's death the plaintiff discovered that at the time of his pretended marriage to her he had a wife still living and not divorced. She sued Cooper's estate to recover for services as his housekeeper.

The Massachusetts Court said:

> "The obligation to make recompense for the injury done by the tort was imposed by law and could be enforced only in an action of tort. It was not a debt or duty upon which the law raised

a promise which would support an action of contract."

The Louisiana case, holding that as to the compensation paid by the employer that party had a cause of action upon an implied contract, independent of statute, for indemnification at the hands of the defendant if the injury was caused by the latter's negligence, cannot have any foundation as law in any other state except possibly Louisiana. The publication of such an opinion by any court carries its own punishment.

If the Court could lawfully imply a promise on the part of the wrongdoer to reimburse the master or the insurance carrier for money paid out to the servant, or his dependents in case of death, to satisfy the award of compensation, then with greater reason could a promise be implied on the part of the wrongdoer to pay the amount of loss which the servant or his dependents sustained by reason of the tort. It may be said that neither the injured servant nor his dependents in case of death had any express agreement with the tort-feasor, but neither did the insurance carrier or the master have any agreement with the tort-feasor. Servants or their surviving dependents ought to be entitled to an equal protection along with masters and insurance carriers, and then why should this protection be confined to servants, dependents, masters or insurance carriers? Having opened the door to fiction on the theory of unjust enrichment (Slade's Case, 1602), why not open it completely to a general fiction? Why not substitute "unjust loss" for "unjust enrichment"? Why not imply a promise to pay damages resulting from tort as against every tort-

feasor? Under such an extension of the doctrine of implied promise, contracts will no longer rest upon agreement or consent except as every person impliedly agrees not to violate the duties or obligations imposed upon him by law. "Let us take heart" and open the door completely to the theory of social contract.

It is Fundamental Law that subrogation cannot take place until the payment of the whole debt or obligation.

Columbia Finance & Trust Co. vs. Railway Co., 60 Fed. 794 (6 C. C. A.; 1894).

In the course of his opinion Circuit Judge Lurton said:

> "The equity of subrogation does not arise from the mere obligation to pay. *It springs alone from payment.* The liability of the surety for the remainder of the debt continued as well after as before such payment, and until the entire debt is paid the surety has no such equity as will entitle him to the aid of a court of equity." (Italics inserted.)

United States Fidelity & Guaranty Co. vs. Centrapolis Bank, 17 Fed. (2d) 913; 53 A. L. R. 295 (1927).

United States Fidelity & Guaranty Co. vs. Union Bank & Trust Co., 228 Fed. 448 (6 C. C. A.; 1915).

A reading of these cases will make clear that there is a *real subrogation* and what is sometimes called a "conventional" subrogation, i. e. a right resting upon contract.

Bingham vs. Walker Bros., Bankers, 75 Utah, 149; 283 Pac. 1055 (1930).

In this case this Court made a clear distinction between legal subrogation, *which is not the direct result of an agreement,* and conventional subrogation, which depends upon a contract. This Court said:

> "Where the person who pays the debt of another stands in the situation of a surety, or is compelled to pay to protect his own right or property, the right of subrogation is a consequence which equity attaches to such a condition, and the right of subrogation under such circumstances is not a direct result of an agreement. This, in law, is termed 'legal subrogation.' In addition to the principle of legal subrogation, there exists another principle termed 'conventional subrogation,' which occurs where the one who is under no obligation to make the payment, and who has no right or interest to protect, pays the debt of another under an agreement, express or implied, that he will be subrogated to rights of the debtor or creditor."

And again:

> "Conventional subrogation depends upon a contract."

If subrogation is brought about directly through a contract or agreement, then it is an assignment, and the manner in which the assignee shall act is controlled by the terms of the agreement. If, however, there is a real subrogation, i. e. one independent of contract, then it is the payment of the obligation, or, as Mr. Justice Pratt says in his opinion, "it is the payment of the award that gives birth to the carrier's rights."

Why? Until the insurance carrier has paid out something it has suffered no loss and acquired no right or equity. If it has paid only a part and not all, then to allow it an action for the part paid violates the principle forbidding the splitting of causes of action. If the insurance carrier has paid only in part and is allowed to recover all, then the Salt Company in this case carrying the primary liability for master's compensation might have a right to complain, or perhaps the dependents of the deceased servant might be injured. If this action is generally assignable the insurance carrier then may sell it to persons even beyond the jurisdiction of the courts of Utah. General assignment and reassignment may ultimately nullify the fundamental purposes of the Workmen's Compensation Act. 217 N. Y. S. 277.

The insurance carrier "having paid the compensation" becomes a subrogee and not an assignee.

City of New Orleans vs. Whitney, 138 U. S. 595; 34 L. Ed. 1102 (1890).

In this case Mr. Justice Bradley, rendering the opinion of the court, said:

> "Subrogation is not assignment. The most that can be said is that the subrogated creditor by operation of law represents the person to whose right he is subrogated."

Orange Ice, Light & Water Co. vs. Texas Compensation Ins. Co., 278 Fed. 8 (5 C. C. A.; 1922).

The Texas Compensation Insurance Company a corporation and therefore a citizen of Delaware, brought suit against the Orange Ice, Light & Power Company

and Yellow Pine Paper Mill Company, each a citizen of Texas, as defendants, to recover for injuries inflicted on Jesse L. Dowdell and for his death resulting therefrom under the provisions of the Texas Workmen's Compensation law. The section of the Texas statute was similar to Section 42-1-58 of the Utah statute. In some respects, however, it was essentially different. The servant, after injury and before his death, elected to receive compensation. After his death the servant's widow claimed compensation. The cause of action of the servant for pain and suffering endured by him prior to his death survived to the widow, and then she had a new and independent cause of action for death by virtue of the death statute of Texas. Under the Texas Compensation statute the insurance carrier, by paying the amount of compensation, became subrogated to the rights of the servant and the rights of the servant's widow. The insurance carrier filed a petition seeking to recover $10,000 for the pain and suffering endured by the injured man and $40,000 for and on account of his death. The trial resulted in a verdict for the plaintiff for $5000 for the pain and suffering and $7000 for the death. Quotation from the opinion:

> "The first point urged is that the United States court was without jurisdiction because, while the plaintiff is a citizen of Delaware and defendants citizens of Texas, Jesse L. Dowdell and Mrs. Ina Dowdell are to be considered for the purpose of jurisdiction as joint plaintiffs, and that at the time the original suit was filed they were citizens of Texas. We do not think this point is well taken. Here the plaintiff, because of payments made and contracts entered into, had

become pecuniarily interested in this cause of action. *The statute of Texas had deprived the employe and his representatives, who elected to hold the insurance association of all right to institute an action against a wrongdoer. The right to institute suit was by the statute lodged in the association.* It was subrogated to all rights of the employe and his representatives, is authorized to sue in its own name, with the right to reimburse itself all sums it had paid and its reasonable attorney's fee, as fixed by the court, and was accountable only for any surplus then left to the legal beneficiary. The entire legal title to the cause of action was under this statute vested in the association primarily for its own security. This made it the sole party plaintiff on whose citizenship the jurisdiction depended. As has been said by the Supreme Court of the United States." (Italics inserted.)

And then follows the above quotation from the opinion of Mr. Justice Bradley in the Gaines case.

The Circuit Court of Appeals of the Fifth Circuit continues:

> "Though other persons may be interested in the recovery and named in the complaint as usees, they are not parties to the action and their citizenship is not to be considered in determining jurisdiction, where the legal title is vested in a party with a substantial interest.

This decision and the statutes of the State of Texas will hold the intense interest of anyone interested in the law.

Staples vs. Central Surety & Ins. Corporation, 62 Fed. (2d) 650 (10 C. C. A. 1921).

In reading this case it must be remembered that the rights and liabilities arise in the State of Oklahoma where actions for injuries have been made to survive by express statute since the year 1909, and where the subrogee master or insurance carrier is limited in right of recovery of damages against the third person to the amount paid in satisfying the compensation award.

Ridley vs. United Sash & Door Co., 98 Okla. 80; 224 Pac. 351 (1924).

As Mr. Justice Pratt said:

> "They" (referring to cases) "must be read in the light of the statutes of the state from which they are taken."

Recurring to the Staples case and to the opinion written by Mr. District Judge Pollock, sitting as a circuit judge, it appears that one Clyde J. Goulger, a servant of an employer named Bush, was injured by a boiler explosion caused by Staples and others. Goulger made claim for compensation from his employer Bush under the Workmen's Compensation law of Oklahoma and received an award of $2230.50. The Central Surety & Ins. Company, pursuant to its contract of insurance with Bush, the employer, paid the amount awarded and in addition thereto paid out the further sum of $1161.50 on account of medical aid and hospital expenses for Goulger as a result of his injuries, and then it paid out legal expenses amounting to $200 in connection with Goulger's claim. The total expenditure was $3592. The insurance carrier was subrogated to Bush's rights against Staples, et al. Among others this question

arose: Was the insurance carrier in this Staples case an assignee? Judge Pollock said:

> "The determination of this issue turns upon the question of whether or not the cause of action alleged by the Central Surety and Insurance Corporation is an assigned one within the meaning of Section 24 (1) of the Judicial Code. We think not. Subrogation is not assignment within the meaning of that section." (Citing authorities.)

The Court held that the insurance carrier received nothing by reason of the consent of Bush, the employer, and that the right of subrogation did not rest upon any relation of contract or privity, but it rested upon, in fact derived its existence from, the law. For these reasons the insurance carrier was not an assignee.

Lynds vs. Van Valkenburgh, 77 Kan. 24; 93 Pac. 615 (1908).

It is not believed that any case can be found containing a more satisfactory explanation of the difference between an assignment and subrogation. This explanation is quoted by the Kansas Court from the case of Gatewood vs. Gatewood, 75 Va. 407, 410. The Court also cites Binford vs. Adams, 104 Ind. 41; 3 N. E. 753 (1885). This Indiana case has to do with the legal effect of the payment of a promissory note by a third person having no interest to protect, holding that such a payment by such a person extinguishes the debt. Equity will subrogate the third person who pays if such person has an interest to protect by payment, but equity will not subrogate the third person who pays and who has no interest in the matter to protect. Such third person must have

a contract whereby the rights of the maker of the note are transferred to the third person who pays the amount thereof.

No better statement of the distinction can be made than to quote from the Kansas case as it quoted from the Virginia case. (93 Pac. 620.)

> "Subrogation and equitable assignment are acts of the law as distinguished from assignment by acts of parties. 'We must be careful to distinguish between an assignment of the mortgage debt and a mere right of subrogation to the lien of the mortgage creditor. Assignment is the act of the parties, and depends generally upon intention. Where the nature of the transaction is such as imports a payment of the debt and a consequent discharge of the mortgage, there can, of course, be no assignment, for the lien of the mortgage is extinguished by the payment. A mortgage creditor cannot be compelled to assign the debt and mortgage upon receiving payment. All that he can be required to do is to give an acquittance and release. The exception to this rule, if it can be so termed, is found in those cases where the party making the payment occupies the position of surety to the debt, or is in some way personally bound for its payment. *Such a person may, in equity require an assignment or transfer, not only of the mortgage itself, but of all the securities held by the creditor, for his protection and indemnity, and, although no such assignment or transfer is actually made, a court of equity will treat it as having been done.* But if the party making the payment does not occupy the position of surety for the debt, as a general rule he cannot claim to be entitled as assignee unless by agree-

> ment with the creditor. *Subrogation is, however, a very different thing from an assignment. It is the act of the law, and the creature of a court of equity, depending not upon contract, but upon the principles of equity and justice. It presupposes an actual payment and satisfaction of the debt secured by the mortgage.* But, although the debt is paid and satisfied, a court of equity will keep alive the lien for the benefit of the party who made the payment, provided he as security for the debt has such an interest in the land as entitles him to the benefit of the security given for its payment." (Italics ours.)

(It will be noticed that Mr. Justice McDonough in his dissenting opinion said, "This right was transferred by operation of law to the insurance carrier upon the dependents' election to take compensation and the payment thereof.")

In the case at the bar it is most earnestly submitted that this Court failed to appreciate the distinction between *"legal subrogation" on the one hand and "conventional subrogation" on the other; the act of the law on one side and the act of the parties on the other.*

> Bingham vs. Walker Bros., Bankers, 75 Utah, 149; 283 Pac. 1055 (1929).

In this Bingham case there was involved the right of the defendant to be subrogated to the rights and remedies of the McMillan heirs in reference to a debt of $4500 which was paid by the defendant to said McMillan heirs. The Trial Court had denied the right of subrogation and this Court was called upon to review the ruling of the

Trial Court. In its opinion the Court stated the question involved:

> "Do the facts in the instant case bring the defendant or its intestate within the principle upon which the doctrine of equitable assignment by subrogation, either legal or conventional, rests?"

The Court made a clear distinction between "legal subrogation" and "conventional subrogation," stating (quoting Par. 7 of syllabi):

> " 'Legal subrogation' results where person pays debt of another by reason of relation of surety or because compelled to pay debt to protect his own rights of property and not *as direct result of an agreement.*" (Italics inserted.)

"Legal subrogation" rests on compulsion; "conventional subrogation" is the direct result of consent or agreement.

Starkweather vs. Cleveland Surety Co., 22 Fed. Cas. 1091, Case No. 13308 (1870).

In this Starkweather case the insured had become bankrupt. An assignee had been appointed and property had been destroyed by fire. The insurance company contended that there could be no recovery by the assignee in bankruptcy because the fire insurance policy read, "If the title to the property is transferred or changed, this policy shall be void, and if without the written consent of the company this policy shall be assigned, it shall be void."

The direct question present for adjudication was: Is the assignment of the register in bankruptcy to the

assignee both of the policy and of the property insured a violation of the above provisions quoted from the policy, and does that assignment exonerate the company from liability? In rendering its opinion the Court did not use the terms "legal" and "conventional" but it classified assignments as of two kinds, one in fact and one in law. Quoting from the opinion:

> "An assignee in fact is one to whom an assignment has been made in fact by the party having a right to assign. An assignee in law is one in whom the law vests the right and control in the property."

It appeared that under the bankrupt law of England the Commissioners of Bankruptcy were required to perform certain statutory powers. In this Starkweather case the Federal Judge quoted Lord Ellenborough as follows:

> "An assignment by the Commissioners in Bankruptcy is the execution of a statutory power given them for a particular purpose, viz: the payment of the bankrupt's debts. Nothing passes from them or nothing ever vested in them. Whatever passes, passes by force of the statute and for the purpose of effecting the object of the statute."

The Starkweather case also contains a quotation from Lord Kenyon in passing upon the terms of a lease which contained a covenant that the lessee "should not set over, assign, transfer or in any manner dispose of the lease without the written consent of the lessor." The lessee confessed judgment and upon execution issued thereon the lease was sold. Lord Kenyon said:

> "I adopt the distinction between these acts which the party does voluntarily, and those that pass in invitum. Judgment in contemplation of law, always passes in invitum, and, therefore, there is no breach."

The discussion has now advanced to a point where a distinction should be pointed out between the Starkweather case and the cases cited therein. The bankrupt owned the property insured and owned the policies of insurance. The lessees in the case decided by Lord Kenyon owned the lease. They had title vested in them to the property which was taken from them by operation of law.

In the case at bar the dependents of Johanson never had any title in the right to recover from the third person for the wrongful death of the deceased. Section 42-1-58 provided two remedies: (a) and (z). (These letters have been adopted because they are the first and the last, a long way apart.) The dependents had the first choice to take one and only one. They took remedy (a) or compensation against the master. The master or the insurance carrier, when it had paid the compensation, took remedy (z), viz: the right to recover from the third person for wrongfully killing Robert Johanson, the deceased whose death is involved herein. No transfer was made. The statute gave one remedy, (a), to the dependents and the other, an entirely different remedy, (z), to the insurance carrier.

State Brewing Co. vs. Cleveland & St. Louis Ry. Co., 275 Fed. 330 (7 C. C. A.; 1921).

In this case Mr. Circuit Judge Baker, speaking for a divided court, among other things said:

> "Unless in some other portion of the Act such right of action is revived it must remain forever dead; *and it is contrary to rational thought to say that a suit can be maintained upon the assignment of a non-existent thing.*" (P. 333.) (Italics ours.)

The division between the majority and minority of the court did not dispute the self-evident truth above quoted.

The dependents, by their election, became vested with the award of compensation. That was their right, and when they made this election those dependents were excluded from every other right under the statute, and never had any other right under the statute. *The statute did not make an assignment.* The dependents did not make one. The statute did not provide for an assignment even to the insurance carrier. One may say that it had the same effect as an assignment, but one may not say that such effect came about by assignment.

The right of the insurance carrier did not result from contract nor did it pass through, either by operation of law or by contract, the dependents of Johanson. It was a right directly vested in the insurance carrier by the plain terms of the statute, and not otherwise. The mere fact that the measure of damages to be applied to the carrier's action may be on the one hand the amount of compensation paid by the insurance carrier, or on the other the amount of damages which the dependents might have recovered had there been no election by them to take compensation, does not and cannot alter the fact that the insurance carrier sues in its own right and recovers "for itself" (opinion of Mr. Justice Pratt.)

Mr. Justice Pratt said, "having accepted compensation they" (the dependents) "are not permitted to sue for damages for the death of their son." And again, "the insurance carrier may, if it sees fit, refrain from enforcing the rights it acquired by subrogation, in which event the dependents—plaintiffs herein—have no complaint. They may not insist that the carrier enforces its rights."

Why, if not because they have no rights in the action? They declined to take any rights in that action. The fact, if it be a fact, that they may share in the recovery when once that recovery is obtained, does not give them any rights in the action. It does not make them either real parties in interest or parties at all.

In the Staples case, supra, where the insurance carrier sued only for the amount it was required to pay out by reason of the negligence of Staples, Judge Pollock said:

> "The compensation law of Oklahoma has nothing to do with the case except as it fixed a liability upon Bush (the employer) for the negligence of appellants. If an automobile belonging to Bush had been destroyed by the exploding boiler he or his insurance carrier could have recovered, and there is nothing in the compensation law to the contrary. Where the injury is to Bush's servant the compensation law required Bush to pay, but the financial loss to Bush or his insurance carrier is just as directly the result of the appellants' negligence as if its force had been spent on his automobile instead of his servant."

(It must be remembered that in this Staples case the court is enforcing the law of Oklahoma where causes of action for personal injuries have long survived.)

In closing the argument in support of Contention No. 1 it is submitted that this Court erred in holding:

First: That Section 42-1-58, either in terms or in effect, *transferred* any rights from the dependents to the insurance carrier, or for that matter *transferred* any rights at all.

Second: That because Section 42-1-58 had the ultimate effect of an assignment of the right of action to the insurance carrier, such ultimate effect in granting rights to the insurance carrier "opened the door completely to general assignability." (Quotation from Mr. Justice Wolfe's opinion.) (This ruling of this one justice has the following unsound results: (a) because the insurance carrier is a subrogee it is also an assignee in fact; (b) because the law subrogates the insurance carrier into rights, such insurance carrier not only becomes an assignee in fact but this subrogation has the same legal effect as a statute providing for general assignability; (c) the statute by this ruling in effect amends the survivorship statute of Utah, because general assignability of the right of action transforms the character of the action from that of a personal right into one of property, i. e. one capable of inheritance.)

It is submitted that the right of the insurance carrier was not made assignable by the statute, and that unless a statute authorized it such right may not be assigned or "reassigned" by that carrier.

CONTENTION NO. 2
THE STATUTORY RIGHT TO RECOVER DAMAGES FROM THE DEFENDANT IS STRICTLY PERSONAL IN ITS NATURE. IT IS NOT A PROPERTY RIGHT.

If the plaintiffs had alleged a request on the part of the defendant made to the London Guarantee & Accident Company, Ltd., to pay the compensation awarded against the Salt Company, and such insurance carrier had paid that award pursuant to said request, then there would have been a sound basis for implying a promise on the part of the defendant to reimburse the insurance carrier for the amount that it had paid out pursuant to such request. The action to recover the money paid out would be classified as ex contractu. It would have survived the death of either a plaintiff or a defendant. On the death of either or both of such parties it would be an asset in favor of the estate of the party who paid the money or a liability against the estate of the party at whose request the money was paid out. No such request is alleged in the complaint, nor is there any allegation of either an express or implied promise on the part of the defendant to reimburse the insurance carrier.

A cause of action for the destruction of property for which an insurance company must pay under its policy can be the subject of subrogation without the aid of statute and without any assignment. If A owns an automobile which he has insured for its full value stipulated at $2000, and B negligently destroys that automobile so that it is a total loss, the insurance carrier is then compelled to pay that loss as it was stipulated in the

policy. Upon payment the insurance carrier is subrogated without any statute and without any assignment, and that insurance carrier may bring an action in its own name against B to recover from him as a tort-feasor, not the amount the insurance carrier paid but the value of the automobile at the time of the loss. B, the tort-feasor, was not a party to the contract of insurance made by A with the insurance carrier, and for that reason such contract neither affects nor fixes his liability. The liability of B is delictual and not contractual in character. The insurance company's right to recover as a subrogee against B is a property right, because under Sections 102-11-6 and 102-11-7 of the Probate Code of Utah "any person or his personal representatives may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken or carried away or converted to his own use the goods or chattels of any such person or committed any trespass on the real estate of such person."

B destroyed the chattel of A and if B negligently or wrongfully committed that act of destruction, then either he or his estate will be liable in an action sounding in tort, not in contract. B, the tort-feasor, was not in any wise enriched or benefited by his destruction of A's automobile, and for that reason no promise on his part to pay the damages could be implied. If B had converted the automobile to his own use instead of destroying it, his tort could have been waived by the owner of the automobile, or his subrogee, the insurance carrier, and an action ex contractu could have been maintained against B. This action ex contractu would be founded upon the

enrichment which had inured to B by reason of his wrongful act, but by the destruction of the automobile this tort-feasor acquired nothing by his wrongful act. The law compels him to atone for his tort, but such liability to pay damages to A is essentially different from the obligation to return the automobile to its owner. The real injury sustained by A was a tort, and the facts as assumed do not connect it with any contract relations between A and B or between B and the insurance carrier, because no such contract relations exist.

It is impossible to imply a tacit agreement unless you can imply a promise to pay damages for a tort.

Let it be assumed that A's servant X was killed in the same accident and B's negligence was the sole cause of the accident. At common law A, the master, had no civil remedy against B, the tort-feasor, because no action could be maintained for the death of a human being caused by the wrongful act or negligence of another or for damage suffered by any person by reason of such death. The question of the survivorship of the action to the servant's representatives would be irrelevant because there was no action to survive.

Section 104-3-11, Revised Statutes of Utah, 1933, provides a remedy to the heirs of X or X's personal representative for the benefit of the heirs of X. This section of the Utah statute is a part of the code of Civil Procedure and applies only to the death of adults, (another for minors) and excepts from its operation cases provided for in Chapter 1 of Title 42. This Section 104-3-11 does not impose any liability on anyone except the wrongdoer. (Of course the doctrine of respondeat

superior is made to work against the wrongdoer.)

Without any other statute than Section 104-3-11, neither the Royal Crystal Salt Company in the case at bar nor its insurance carrier would have been in any sense liable to the heirs or dependents of the deceased servant, because no one claims that either the master or the insurance carrier was at fault. The liability of the master and its insurance carrier to the dependent resulted from the provisions of the Workmen's Compensation Act. The Royal Crystal Salt Company, the employer, was required to pay compensation by reason of the provisions of that Act, and the election of the dependents, and the insurance company was compelled to pay that liability because of the provisions of its insurance contract with the Royal Crystal Salt Company. Without the aid of a statute changing the common law and otherwise providing, neither the Salt Company nor the insurance carrier would have had any remedy against the person whose wrongful act caused the death of the servant.

Admiralty Commissioners vs. Steamship America, A. C. 38 Ann. Cas. 1917B, 877 (1917).

Mobile Life Ins. Co. vs. Brame, 95 U. S. 754; 24 L. Ed. 580.

These cases and others have already been discussed in this brief. They are not in conflict with the following cases:

Travelers' Ins. Co. vs. Great Lakes Engineering Co., 184 Fed. 426, 36 L. R. A. (N. S.) 60 (6 C. C. A.; 1911).

Staples vs. Central Surety & Ins. Corp., 62 Fed. (2d) 650 (10 C. C. A.; 1932).

Take the Travelers' case first, for that is the one where the *death of Leinhart was involved.* The insurance company in its petition sought to recover the sum of $2855, itemized as follows:

Money paid out:	
For the wrongful death of Joseph Leinhart	$2750
Court costs	15
For injury to Edward Wund	75
Court costs	15
Total	$2855

The plaintiff alleged as a ground of recovery that the death of Leinhart and the injury of Wund were caused by the negligence of the Engineering Company while it was installing a refrigerating machine and a steam engine in the place of business of the Herancourt Brewing Company. The deceased and injured person above named were employees of the Brewing Company. The plaintiff was the insurance carrier of that Brewing Company. There was an express stipulation in its policy of insurance providing for the right of subrogation.

The defendant contended that as to the death of Leinhart, the petition did not state facts sufficient to constitute a cause of action, and with the Leinhart item taken out, the jurisdictional amount, to wit: $2000, would not be involved and the Federal Court would have no jurisdiction. (The jurisdictional amount of the Federal

Court was required to be in excess of $2000 up until 1912.) The sole question involved in the case as reported could be stated in the language of the Court:

> "Whether the insurer, by reason of a contract of indemnity against employers' liability, such as exists here, can maintain an action against a third party whose negligence has caused liability to the insured employer for injuries resulting in the death of its employee."

Circuit Judge Knappen of Sixth Circuit Court of Appeals, commented upon the Brame case and said:

> "the insurance contract there involved was not one of indemnity to those injured by the death, *but was a wagering contract.* The principle of subrogation could have no application to that case, because rights thereunder must have been asserted in the name of the insured, and whatever right of action he may have had abated with his death." (Italics ours.)

He also referred to the decision from Connecticut involving the death of Dr. Beach, which he also said rested upon the same ground as the Brame case.

Is this statement entirely accurate? If the contract of insurance upon the life of either McLemore or Beach had been a wagering contract, then it would have been void as against public policy. No greater element of wager inhered in the policies of McLemore or Beach than that which inhered in the policy where Leinhart was involved. A wager policy is one in which the beneficiary has no interest whatsoever in the subject matter covered by the insurance, whether it is life or property, but only an interest in its loss or destruction.

32 Corpus Juris, 1094.
Steinbeck vs. Diepenbrock, 158 N. Y. 24; 52 N. E. 662
70 Am. St. 424; 44 L. R. A. 417 (1898).

(Opinion by Chief Justice Parker.)

Then again, the right of the insurance company to recover as a subrogee for the wrongful death of McLemore, of course, could not have been asserted in the name of McLemore. McLemore was dead and he had no right of action. None abated because none existed. It was his death that caused pecuniary loss to the insurance carrier. That carrier to recover from Brame was required to have an action in its own right by reason of Brame's wrongful act which resulted in the death of McLemore; or as a subrogee of some person who had been given a right of recovery because of the wrongful death of McLemore by the Louisiana death statute. The court decided that the insurance company had no right of its own, even though that company had suffered a pecuniary loss of $7000 by reason of McLemore's death. Company had no right under death statute.

Of course, it will readily occur to anyone who thinks about it that an insurance contract could be made against loss of earning power by reason of accident or death to cover a period of time stipulated in the policy while the insured might work, and the right of subrogation of the insurance carrier paying any loss occasioned by accident or death against anyone negligently causing such loss could be made a part of such contract. Unless the insurance policy provided for subrogation, it is submitted such right would not exist.

Connecticut Mutual Life Ins. Co. vs. New York, N. H. Ry. Co., 25 Conn. 265; 65 Am. Dec. 571 (1856).

(Beach case, where right of subrogation is discussed.)

Gatzweiler vs. Milwaukee Ry. Co., 136 Wis. 34; 116 N. W. 633; 18 L. R. A. (N. S.) 211 (1908).

(See note, 65 Am. Dec. 629, where cases are collected, and note 18 L. R. A. (N. S.) 211.)

The petition in the Travelers' case was held sufficient in its facts because of the rule whereby an employer not in fault who has been compelled to pay damages to a third person for the negligence of his agent or employee may maintain an action over against agent or employee to recover what employer has been compelled to pay. After pointing out this rule, Judge Knappen said:

> "The brewing company thus had, by virtue of its alleged relations with the engineering company, a right of action over against the latter for negligence on its part which caused legal damage to the brewing company. The injury to the brewing company resulting from that negligence was direct and immediate."

In the next paragraph of the opinion he said:

> "With respect to injuries not causing death, as in the case of Wund, we apprehend this proposition would not be questioned. With respect to the damage resulting from Leinhart's death, the fact that Leinhart had no right of action is immaterial. There is no attempt to recover herein any right of his. The ground of the recovery sought is that the engineering company failed in

> its primary and positive duty toward the brewing company, whereby the latter company sustained a loss. It can make no difference with its right of action over, that the original recovery against it belonged to one person rather than another,— to the widow and children rather than to the representative of Leinhart's estate. Under the allegations of the petition, the negligence of the engineering company was the direct and sole cause of Leinhart's death, and thus of the damages suffered by the brewing company." (Would Leinhart's contributory negligence be a defense?)

Judge Knappen pointed out in his statement of facts that the policy of insurance subrogated to the extent of its payment the insurance carrier to all rights of recovery by employer for loss by the assured.

The subrogation in the Travelers' case was one where the insurance carrier obtained the rights of the Brewing Company by virtue of the contract of insurance made between the Insurance Company and the Brewing Company. To recover, the Insurance Company was required to prove, according to Judge Knappen's opinion, that Leinhart's death occurred through the negligence of the Engineering Company, and also the extent of the damages recoverable by his relatives on account of that death. (This is practically a quotation from the latter part of the court's opinion, and from it the inference is inevitable that the action against Engineering Company is delictual and not contractual in character.)

Take the Staples case from the Tenth Circuit. The insurance company paid out the full amount of the award, to wit: $2230.50, and in addition thereto the further

sum of $1161.50 on account of medical aid and hospital expenses incurred in treating the insured. The insurance carrier sought to recover from Staples the total of these two amounts, to wit: $3592, paid out pursuant to its contract of indemnity insurance. This contract contained a provision that in case of any payment under said contract the insurance carrier should be subrogated to the extent of any such payment to all rights of recovery therefor vested by law in Bush or in any employee or his dependents, against persons, corporations, associations, or estates. Personal injury to one Gougler, an employee of Bush, was the occasion of the above payments.

The Tenth Circuit Court of Appeals, speaking by Judge Pollock, pointed out that upon the question of negligence no issue was raised on the appeal, and then said:

> "It is a well-recognized rule, supported by a great weight of authority, that, where one has been subjected to liability, and has suffered loss thereby, on account of the negligence or wrongful act of another, the one has a right of action against the other for indemnity."

After reviewing certain cases he continued:

> "Upon this settled principle, it is clear that Bush, having been subjected to liability to his employee, Gougler, under the Compensation Law, as a result of the negligence of appellants, had a cause of action, in his own right, for indemnity against appellants, at common law entirely independent of any provisions of the Compensation Law. And the appellee, having discharged Bush's liability to Gougler, pursuant to its contract of

insurance, is subrogated to Bush's right against appellants."

And again:

> "The appellee does not sue for the unliquidated damages suffered by Gougler; it sues only for the amount it was required to pay out by reason of the negligence of appellants." (This is Oklahoma law. See Ridley and other Okla. cases.)

He finally says in substance that no inquiry need be made whether Gougler had any right to pursue his remedy against appellants, or whether such right had been abrogated by the Compensation Law of Oklahoma, stating:

> "The Compensation Law of Oklahoma has nothing to do with the case, except as it fixed a liability upon Bush for the negligence of the appellants."

(The Compensation Law of Oklahoma did not fix any liability upon Bush, the employer, or anybody else, *for the negligence of the appellants* or anybody else. The negligence of Staples may have caused the injury to Gougler, but the liability of the employer under the Compensation Act arose merely from the injury, and that liability was fixed by applying the standards prescribed by the Act itself, without the consideration of any element of fault or wrong on the part of anybody.)

The last paragraph of Judge Pollock's opinion is interesting. He says:

> "If an automobile belonging to Bush had been destroyed by the exploding boiler, he or his insurance carrier could have recovered, and there

> is nothing in the Compensation Law to the contrary. Where the injury is to Bush's servant, the Compensation Law required Bush to pay; but the financial loss to Bush or his insurance carrier is just as directly the result of appellants' negligence as if its force had been spent on his automobile instead of his servant."

(Does Judge Pollock mean that in an action by the insurance carrier against a tort-feasor for negligently destroying an automobile the measure of damages could be determined by the amount the insurance carrier had been compelled under its contract of insurance to pay to the person who had owned the automobile at the time of its destruction? It is to be hoped that a proper construction of the language quoted is to the effect that the tort-feasor pays the full value of the thing destroyed by him as it might be determined in a case where he was a party, and no more than that value as it might be determined in such a case.) See also Grand Rapids Lumber Co. vs. Blair 190 Mich. 518; 157 N. W. 29 (1916).

The purpose of the Compensation Act was that payments under it should be a partial substitute for wages that might have been earned by the employee had he not been injured or killed. To achieve these purposes the compensation awarded is paid in periodical installments rather than in a lump sum. It takes a substantial showing to obtain a lump-sum-award. The right to these payments is a personal one either to the injured employee or to his dependents in case of death. It is well known that these unfortunate persons need protection not only as against strangers but even as against their own improvidence. The right to compensation under that Act

and the right to recover damages from the tort-feasor are so different in character that in the absence of some statute applying the rule of subrogation that rule would be entirely inapplicable.

Newark Paving Co. vs. Klotz, 85 N. J. L., 432; 91 Atl. 41 (1914).

In this case the Court said:

> "If the statutory compensations were subject to deductions by reason of payments made by a third person, the tort-feasor, to the person injured or to his dependents, in satisfaction of the liability for the tort, this object of the statute would be thwarted, and in effect the commutation to a lump sum would take place without any order of the court and at the will of the injured party or his representatives. If, on the other hand, the employer were allowed to recover of the tort-feasor by action in the name of the employe or his representative, he would be able to recover in advance of payments by him and at a time when the extent of his own liability could not be ascertained."

Has the Compensation Act made the servant working in the course of his employment analogous to a machine used in the industry where the servant works, so that the master or the insurance carrier of that master has a property right in the servant as in an automobile while he is working in the course of his employment? May the insurance carrier recover for the destruction of that right to the extent of its loss? If anyone shall answer these questions in the affirmative, he will find

it impossible to extricate himself from the dilemma created by his affirmative answer.

The action to be prosecuted against the wrongdoer is not mentioned in Sections 102-11-5, 102-11-6 and 102-11-7, and therefore even though it may be called a property right, it is not capable of inheritance under those sections, and those sections are exclusive. Anyone who wades that ditch will find the water more than chin-deep. Looking at the action from the standpoint of the wrongdoer, his liability ceases with his death.

Section 104-3-19 provides:

> "An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, *if the cause of action or proceeding survives or continues.*" (Italics ours.)

No person reading this statute can escape the inference that if the cause of action does not survive, then the pending action abates and cannot be revived.

CONTENTION NO. 3

THE RIGHT CLAIMED IN THE COMPLAINT IS A PERSONAL RIGHT WHICH THE DEPENDENTS MIGHT HAVE ELECTED TO TAKE; IT IS NOT A PROPERTY RIGHT.

Regardless of the rights of the insurance carrier under Section 42-1-58, or independent of that statute, an examination of the complaint in the case at bar compels and permits but one conclusion, and that is that the plaintiffs are seeking to recover damages from the defendant

on the ground that the defendant has violated the personal rights of the deceased, Robert Johanson, causing a personal injury to said Johanson, and that said personal injury caused the death of Johanson. These plaintiffs claim that they were dependent upon the deceased for support. They unequivocally allege that they claimed and were awarded compensation for and on account of the death of the servant, and now they seek, *by means of the alleged assignment, to thwart and nullify the election which they intentionally made to take compensation.*

The purpose of the statute was to give the dependents a choice of one of two remedies. That statute in plain terms provides that when compensation is claimed by dependents and awarded to them, they have completely and forever exhausted their remedies and consequent rights against all persons for and on account of the death of the servant. By making their claim for compensation, and obtaining its award, they debarred and precluded themselves from thereafter making any further claim either for compensation or damages.

It is true that in their complaint they do not allege that the insurance carrier has paid the compensation awarded, or any part thereof, and they make no allegation from which such fact might be inferred. As indicating a possible desire to exclude such fact from the complaint, they allege that the insurance carrier, *by reason of the award,* "became subrogated to the rights of the plaintiffs herein in said cause of action against the defendant under the provisions of Section 42-1-58 Revised Statutes of Utah, 1933; that subsequent thereto, on the 29th day of August, 1939, the said London Guarantee &

Accident Company, Ltd., for a valuable consideration, executed and delivered to the plaintiffs herein a *waiver of said right of subrogation* and an assignment of its said cause of action against said defendant herein." (Italics inserted.)

If this allegation is given its full force it means: (a) that the insurance carrier was subrogated without payment of the award; (b) that without payment of the award the insurance carrier, for a valuable consideration, waived its right of subrogation; (c) in order to make such alleged waiver effective, to clinch the same, so to speak, the insurance carrier made an assignment to the plaintiffs.

In appellants' brief, on Page 14 it is said: "It is to be noted, however, that the insurance carrier not only assigned its cause of action but waived its right of subrogation." It is then contended in that brief that aside from the assignment and waiver the plaintiffs can maintain this action in view of their interest.

This Court in its opinion has held that the plaintiffs cannot maintain this action *in their own right;* that Section 42-1-58 offered them one of either of two alternatives; that their acceptance of either waived their rights under the other; that they have no right in the action to recover damages from the third person after they have claimed and been awarded compensation; that they may not even insist that an action against the third person shall be brought by the insurance carrier.

All of the justices of this court seem to be agreed that the plaintiffs must sue, if they may sue at all, as

assignees of the insurance carrier's cause of action. All of the justices seem to agree that except for the provisions of Section 42-1-58 (which has been shown not to authorize any assignment) the only test of assignability of an action is survivability.

Now, if the attempt of the dependants is made successful by the decision of this Court, then that which was made an *irrevocable* election on their part becomes *revocable* at any time during the period required for the payment of the award of compensation, or during the period while the action is not barred by the statute of limitations. These dependents during that period, however, indefinite it may be, may ignore, even flout, the award of the Industrial Commission and agree with the insurance carrier that the award need not be paid, and in consideration of its release the dependents may take that which they never had—the right to bring an action against the third party as if they, the dependents, had never claimed or obtained an award of compensation.

The action alleged in the complaint does not survive because it is not an action:

(1) For the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto or to determine any adverse claim thereon;

nor

(2) Is it an action founded upon contract (express or implied (Section 102-11-5);

nor

(3) Is it an action against any person who has wasted, destroyed, taken, carried away or converted

to his own use the goods of a testator or intestate in his lifetime;

nor

(4) Is it an action for trespass committed on the real estate of a decedent in his lifetime (Section 102-11-6);

nor

(5) Is it an action against executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, carried away or converted to his own use the goods or chattels of any such person or committed any trespass on the real estate of such person. (Section 102-11-7.)

The action for which recovery is sought is not included in the survivor statutes of the Probate Code of this state. Therefore, it does not survive. Even if pending in court, it abates unless it survives or continues. (Sections 104-3-19.)

Not surviving, it is not a property right. Even under the broad terms of the Probate Code, only those things which survive are capable of inheritance. These and only these are property in the true sense of that word. Everything generally assignable or capable of general assignability is capable of inheritance, and is property *because when it is generally assignable it is capable of a legal existence, separate and apart from its original owner.* If it is generally assignable it is not in any sense personal to its owner; it is from a legal standpoint as sound and as capable of use, enjoyment, protection and enforce-

ment when owned by any person as when owned by one particular person.

The right to recover damages for injuries resulting in death is one created by statute. The first statute was passed in this territory in 1874. With the coming of statehood the power of the legislature to abrogate that right of action was prohibited by the Constitution; but in 1920 the people of this state amended the Constitution and provided that the legislature might abrogate the right of action to recover damages for injuries resulting in death if compensation for such injuries was provided by law. This Supreme Court has held that because of the amendment of 1920 the legislature may provide compensation in lieu of the right to recover damages, but the legislature may not take from the dependents their rights to *some* compensation.

> Halling vs. Industrial Commission, 71 Utah, 112; 263 Pac. 78 (1927).

It seems clear that while under the constitutional provision as it has existed since 1920, the legislature of this state has no power to entirely abrogate the right of the dependents of a deceased servant to compensation, that legislature may, after providing for such compensation, entirely deny to the dependents the right of action to recover damages for injuries resulting in death.

In the case at bar that right to recover damages never vested in the dependents. They had the choice of the two remedies and they voluntarily and intelligently elected to take the right to compensation. From thereon their right to recover damages was as nonexistent as at

common law. The insurance carrier had no vested right to recover damages for injuries resulting in the death of Johanson until it had paid the compensation awarded. The right of action of tort for personal injuries is not property.

> Mulvey vs. City of Boston, 83 N. E. 402; 197 Mass. 178; 14 Ann. Cas. 349 (1908).

If the injury did not result in death, then at common law it was a valuable personal right. If the injury resulted in death, no right of recovery existed.

In the Massachusetts case just cited, Mr. Chief Justice Knowlton, referring to a claim in an action of tort, said:

> "In some sense of the word such a claim is not property. It is not assignable, and it cannot be appropriated by creditors in proceedings in bankruptcy or insolvency."
>
> Holt vs. Stollenwerck, 174 Ala. 213; 56 So. 912 (1911).

In this Alabama case the facts were, that the widow of Charles M. Bryan intermarried with T. G. Holt, pending a suit by Bryan's administrator to recover damages for his wrongful death. Afterwards, while the suit was yet undetermined, *the wife of Holt and widow of Bryan died.* Still later the administrator had a recovery of substantial damages. The surviving second husband petitioned the court to be allowed to participate in the damages which had been recovered because of the death of Bryan, the first husband. These damages constituted the entire estate of Mrs. Holt.

Under the statutes of Alabama it is provided that if a married woman having a separate estate died intestate, leaving a husband living, he was entitled to one-half of the estate. It was further provided by the Alabama statutes that all of the property of the wife held by her previous to the marriage, or to which she became entitled after the marriage, was her separate property, not subject to the liabilities of the husband. The death statute provided that the damages recovered were not subject to the payment of the debts or liabilities of the testator or intestate, *but must be distributed according to the statute of distribution.* (When judgment was recovered it was property.)

According to the Utah law as it has existed from the time of its first death statute to the present day, the proceeds recovered in a death action have never been subject to the payments of the debts or liabilities of the deceased, but have always been a fund for particularly named beneficiaries.

In this Alabama case the second husband contended that the *cause of action* arising out of the death of Mrs. Holt's first husband became a part of the property of her estate. The Alabama court said:

> "we state our conclusion that the mere right to sue for damages conferred by section 2486 of the Code, is not property, within the meaning of the statutes of distribution."

By way of discussion the Court further said:

> "It is the generally, if not universally, accepted American doctrine that all causes of action arising from torts to real or personal property,

by which its value is diminished, as well as choses ex contractu, survive and pass to the executor or administrator as assets in his hand, and are in consequence assignable. See note to McCormack vs. Toronto Railway Company, 7 Am. & Eng. Ann. Cas. 500. It is also well settled that, in the absence of statutory provision, rights of action for torts purely personal do not survive, and are not assignable. Weller vs. Jersey City Railway Company, 68 N. J. Eq. 659, 61 Atl. 459; Id., 6 Am. & Eng. Ann. Cas. 442. Scores of adjudicated cases might be cited to both these propositions. The right to prosecute an action for the wrongful death of his decedent is vested by the statute creating the right in the personal representative for a definite legislative purpose, to prevent homicide. In prosecuting such action, the personal representative does not act strictly in his capacity as administrator of the estate of his decedent, because he is not proceeding to reduce to possession the estate of his decedent, but rather he is asserting a right arising after his death, and because the damages recovered are not subject to the payment of the debts or liabilities of the decedent. He acts rather as an agent of legislative appointment for the effectuation of the legislative policy, and upon recovery as a quasi trustee for those who stand in the relation of distributees to the estate strictly so called. White vs. Ward, 157 Ala. 345, 45 South. 166, 18 L. R. A. (N. S.) 568. And the right is vested in the personal representative alone. *No one else,* under any circumstances except in case of the death of a minor child, where section 2485 gives a preferred right ot the father or mother, *can maintain the action in any forum.* The mere right of action is therefore nonassignable at law and

> in equity. *The right of disposition is inherent in every notion of property.* On these considerations of general law, we are of opinion that Mrs. Holt had no property right in the cause of action created by the statute. Her right was personal merely." (Italics inserted.)

If anyone cares to read the balance of the opinion he will find the Court holding that the words "things in action," as used in another section of the Code, include only assignable rights of action, and that "no debt arises out of tort."

It is settled law in this state that the right of action to recover damages for injuries resulting in death is for the benefit of the heirs of the deceased under Section 104-3-11. The personal representative of the deceased may be a party plaintiff in prosecuting the action, but he prosecutes for the benefit of the heirs of the deceased.

Under Section 42-1-58 the dependents of the employee, in case the latter's injury results in death, may at their option claim compensation or have their action for damages against the third person whose act wrongfully caused the death of the employee. If they do not take compensation they are then vested with the right of action which may exist against the third person. This action they prosecute in their own names, and, as has been held by the Utah Supreme Court in Thorpe vs. Union Pacific Railway Co., 24 Utah, 475, supra, the action cannot be commenced or maintained in the name of any other person than the one to whom the right is given by the statute. If the dependents claim and are

awarded compensation, then the statutory party plaintiff is either the master or its insurance carrier. This insurance carrier under these circumstances is the *only person* who can maintain the action in any form. On recovery, if there is a recovery, the insurance carrier plaintiff becomes a judgment-creditor, and as such that carrier is charged with the duty of distributing the fund recovered according to the terms of the statute.

Nature of Action; It is not Contractual: It is believed to have been established that no basis can be found for either the origin or existence of this right of action in contract, express or implied.

It is not Proprietary in Character: A mere violation of a duty imposed by law, resulting in pecuniary loss to the person whose rights are violated without enrichment or pecuniary gain to the tort-feasor cannot give rise to a proprietary remedy. The inconvenience, distress or pecuniary prejudice of that person cannot be conceived of as a *res* or thing in the possession of the wrongdoer. The value of the estate of the deceased was in no wise diminished by the wrongful act. No debt arises out of tort in advance of judgment, and the proceeds of the judgment become the property of the insurance carrier, to be used and paid out as is provided by statute. What is said here of a breach of duty imposed by law is equally true of a broken promise.

Keigwin Cases in Common Law Pleading, P. 38.

It is an Action Ex Delicto: The injured person may have suffered great pecuniary loss without the wrongdoer being enriched in the slightest particular. Under such

circumstances, in the absence of an express contract to reimburse, the only remedy remaining is for the personal tort. That and only that constitutes the wrong. There is no breach of contract because there is no contract. There is no money had and received either wrongfully or as a loan, or paid out upon request. There is no property received by way of bailment or conversion. Not the slightest benefit passed to the wrongdoer. There was not the slightest depletion of the estate of the deceased.

It is charged in the complaint of the plaintiffs that the defendant negligently caused the death of their son, Robert Johanson. If such fact is established by proof, the defendant must answer for the damage caused to the dependents by its tort. It is the damage done to and the loss sustained by the dependents that constitutes the measure of recovery. If that measure is to be determined by the enrichment of the defendant, there could be recovery. If recovery by insurance carrier under this section of the statute is limited to the money paid out by insurance carrier to satisfy the award of compensation, then that is a mere limitation of damages on the theory that the insurance company suffered no greater loss than that which it paid out, and that the dependents can have no interest in the recovery. Albrecht Co. vs. Iron Works, 200 Mich. 109; 166 N. W. 855 (1918). Even under this construction of the statute, the action against the defendant is still what it would have been if the dependents had elected to prosecute it in their own names for themselves.

At common law the action was trespass on the case. It was not debt, detinue, covenant, trespass, ejectment

or replevin. These were the common law actions prior to A. D. 1285. It was not trover; it was not assumpsit, but it was trespass on the case. Case, trover and assumpsit came into existence by virtue of the Statute of Westminster, 1285. (It is well to recur to these rather ancient actions.)

Prior to that year there was no remedy:

> "I. For wrongs to person or property which were done without force;
>
> II. For wrongs which, though involving force, were not immediately injurious, but only indirectly and by consequence;
>
> III. For wrongs which, though forcible and in themselves injurious, affected property not in the possession of the owner; and
>
> IV. For breaches of executory contracts not under seal, such as failure to perform a parol promise."

Keigwin Cases in Common Law Pleading, P. 126.

It will be noticed that in the survivor statutes, Sections 102-11-5, 102-11-6 and 102-11-7, causes of action arising from torts to real or personal property by which the estate's value is diminished (without any enrichment of wrongdoer) survive for and against the estates of deceased persons. These are causes of action ex delicto. They are purely personal torts committed as against the property, and because their destruction or injury diminishes the value of the estate of the persons owning such property, these rights of action have been made to survive along with the others designated in the statute; but the statutes can be read and re-read and no provision

can be found from which it may be concluded that there is any property right claimed in this complaint of the plaintiffs. There is no property right created by the provisions of the statute Sec. 42-1-58. The only property right that could exist would be one worked out on the theory of the Louisiana case, 93 So. 613. (Supra.) That theory is at war with all sound legal concept.

CONTENTION NO. 4

THE INSURANCE CARRIER ACQUIRED NO PERSONAL OR PROPERTY RIGHT UNTIL IT HAD PAID IN FULL THE COMPENSATION AWARD. AN ASSIGNMENT OF A NON-EXISTENT RIGHT IS VOID.

The discussion of Contentions Nos. 1, 2 and 3 has necessarily explained the reasons which constitute the basis for Contention No. 4.

As the writer of this brief understands the opinions of this Court, it seems unnecessary to argue that it was full payment of the award of compensation by the insurance carrier that vested in that carrier any right of action against the defendant. The assignment of a non-existent right of action would be a nullity, even though the right of action when it came into existence would under the law be assignable. An executory agreement to assign a right of action not yet in existence would not and could not mature the right of action. To mature it, requires full payment.

As Federal Judge Baker said:

> "It is contrary to rational thought to say that a suit can be maintained upon the assignment of a non-existent thing." (275 Fed. 333.)
>
> See also Albrecht Co. vs. Iron Works, 200 Mich. 109; 166 N. W. 855 (1918).

If the thing itself cannot legally exist, then any assignment of such non-existent thing is also non-existent.

CONTENTION NO. 5

THIS COURT, HAVING HELD THAT THE COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSITUTE A CAUSE OF ACTION, HAD NO POWER TO REVERSE THE JUDGMENT OR TO ALLOW THE PLAINTIFFS TO AMEND THEIR COMPLAINT.

It would seem that the above statement cannot be otherwise than absolutely accurate from a legal standpoint. Let us look at the record facts as they are shown by the transcript.

It appears from the transcript, not only from its minute entries but from the judgment itself, that the Trial Court heard this case on the 4th day of April, A. D. 1940, on the complaint of the plaintiffs and the demurrer of the defendant thereto, all counsel appearing; that thereafter, on the 6th day of May, A. D. 1940, the Trial Court made an order sustaining the demurrer of the defendant to the plaintiffs' complaint, and in said order allowed the plaintiffs ten days within which to amend; that regular notice in writing was given

by the attorneys for the defendant and served upon the attorneys for the plaintiffs on the 6th day of May, A. D. 1940; and it further appears "that the plaintiffs, by their attorneys, have declined this right to amend and failed and refused to plead further, and thereby elected to stand upon the complaint of the plaintiffs, and the time having fully expired within which the plaintiffs might make any amendment to said complaint," it was ordered, adjudged and decreed that the plaintiffs take nothing by their action; that the complaint be and the same is hereby dismissed. This judgment was entered in open court on the 17th day of May, A. D. 1940. (Tr. 12-13.)

(Please examine the Transcript.)

The Trial Court did not deliver or file any opinion, stating the reasons that impelled that Court to sustain the demurrer. The demurrer, however, was a general one, and under the Utah Code the objection that the complaint does not state facts sufficient to constitute a cause of action may be raised in a cause at any stage of the proceedings. (Sec. 104-8-6.)

At common law and under the Code of Utah the granting of leave to amend a complaint is discretionary with the Trial Court when a demurrer has been sustained by the Court, and an appellate court will not interfere with the trial court's discretion unless a clear abuse of that discretion by the Trial Court is shown; but there need be no concern relative to an abuse of discretion because the Trial Court in this case expressly granted leave to the plaintiffs to amend, and the plaintiffs, by

their counsel, *refused to amend and elected to stand upon their complaint.* This amounted to a submission to judgment on the facts alleged by the plaintiffs and for the purposes of the demurrer admitted by the defendant.

Gammon vs. Bunnell, 22 Utah, 421; 64 Pac. 958 (1900).

In this case the Utah Supreme Court held that when the Supreme Court set aside the judgment of the court below sustaining a judgment, then unless the defendant whose demurrer had been sustained in the District Court but overruled in the Supreme Court withdrew his demurer, the judgment should be ordered in favor of the plaintiff as prayed for in the complaint. On rehearing the defendant having presented an answer on the merits showing a meritorious defense, this Court in the exercise of its discretion permitted the defendant to file its answer to the complaint on "such terms as may be just."

In Stewart vs. Douglass, 148 Cal. 511; 83 Pac. 699 (1906), the Supreme Court of California held:

> "When a demurrer is sustained to a complaint, it is within the discretion of the court either to allow an amended complaint to be filed, or to give judgment forthwith in favor of the defendant. The appellate court will in every such case sustain the action of the court below, whatever course it may take, unless it is made to appear by the record that there has been an abuse of discretion."

And again:

> "The right to amend after the filing of a demurrer is absolute only when it is exercised

> before the demurrer is argued and submitted to the court for decision."

Section 104-14-3 among other things provides for the amendment of any pleading once by a party as of course *before* the time for pleading to it has expired, or after demurrer and *before* the trial of the issue of law thereon. A refusal of leave to amend cannot be held to be an abuse of discretion where there is nothing in the record to show that the plaintiff asked leave to amend in any designated particular or in any way specify the nature of any proposed amendment.

Marsh vs. Lott, 156 Cal. 643; 105 Pac. 968 (1910).

In the case of Marsh vs. Lott, supra, the demurrer of the defendant to the complaint was based upon several counts, among which was that the plaintiff was guilty of laches. As a matter of fact, a prior suit had been brought by plaintiff against defendant, but the fact of such effort on the part of the plaintiff was not alleged in the complaint. If this fact had been alleged the plaintiff would have avoided the bar of laches, but he might have shown himself estopped by the judgment entered in the former case. In the Supreme Court of California on appeal, the plaintiff contended that such court should take judicial notice of the prior action brought by plaintiff against the defendant, but the Supreme Court held that it knew of no rule warranting such judicial notice, and the Supreme Court then said:

> "As to the refusal to allow plaintiff to amend his amended complaint, there is nothing in the record to indicate that he asked leave in the superior court to amend in any designated particu-

> lar, or in any way specified therein the nature of any proposed amendment. We do not see how, under such circumstances, we could hold that the superior court abused its discretion." (Citing Kleinclaus vs. Dutard, 147 Cal. 252, 81 Pac. 516, and cases cited therein.)

An interesting case is that of Bailey vs. Holden, 50 Vt. 14 (1877). In the Bailey case the defendants demurred for want of equity. That demurrer was overruled. The defendants then appealed to the Supreme Court of Vermont where ruling was affirmed. It is best to quote its language:

> "Upon the opinion being read and the decision announced, counsel for the defendants asked leave to withdraw the demurrer, and to be permitted to make answer, and defend on the facts on reasonable terms. This would require that the decree should be reversed, and the cause remanded, to be proceeded with *de novo*. The application was denied. It was deemed unjust to the orator to subject him to the protraction of the litigation, after it had gone to the final decision in the Supreme Court, upon such defense as the defendants elected to make, and upon their appeal from a decree against them in the Court of Chancery. It was their right, in accordance with rule and usage, in an answer as to matters of fact, to have traversed the sufficiency of law of the facts alleged in the bill, as by demurrer, and to the same effect. Having chosen to rest their defense upon the facts confessed by the demurrer, and carried the experiment to the last extremity, it was regarded unwarrantable to allow the litigation and the decision upon it to go for nothing, and permit the cause to be put back as it was upon the

> filing of the bill, when the only reason assigned for it, was, that 'defendants' solicitors *had erred in their judgment of the law.*' " (Italics inserted.)

Billesbach vs. Larkey, 161 Cal. 649; 120 Pac. 31 (1911).

In this case a demurrer to the third amended complaint was sustained. Leave to amend further was refused and judgment was rendered. The Supreme Court held that the refusal to amend was not an abuse of discretion. In the course of its opinion the Court said:

> "There were, however, several other causes of demurrer assigned. If we find the ruling justifiable on any of the other grounds the judgment must be affirmed. We cannot take notice of the supposed reasons of the court below and we are not confined to those reasons in considering the rights of the parties upon the appeal."

This case held that the judgment for the defendant should be affirmed if the appellate court could sustain a demurrer to the complaint upon *any* of the grounds of demurrer, whether on the particular ground stated by the trial court or not, and this holding in this Larkey case is in accord with that of Burke vs. Maguire, 154 Cal. 456; 98 Pac. 21 (1908). In this Burke case it appeared that the demurrer of the defendant had been sustained and judgment entered. Quoting from the opinion of Mr. Justice Shaw:

> "It is claimed that the order cannot be affirmed unless this court agrees with the lower court in the opinion referred to in the order. We do not so understand the law. If the complaint

> is insufficient upon any ground properly specified in the demurrer, the order must be sustained, although the lower court may have considered it sufficient in that respect, and may in its order have declared it defective only in some particular in which we hold it to be good. The defendant is entitled to the decision of this court on all questions presented by the demurrer and necessary to the decision made." (Citing authorities.)

The demurrer in the case at bar is general and avers that the complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiffs and against the defendant. The Trial Court sustained that demurrer, and this Court has held that the Trial Court committed no error in sustaining the demurrer of this defendant. The appellants, the plaintiffs, appealed to this Court. They did not allege or assign any error on the part of the Trial Court relative to the matter of amending their complaint, because that question never came up in the Trial Court. It could not come up because the Trial Court did not deny the plaintiffs' right to amend their complaint; on the contrary, the Trial Court held the demurrer under advisement from the 4th day of April until the 6th day of May, 1940, and when he sustained the demurrer on that last named day, in his order the Trial Court allowed the plaintiffs *ten days within which to amend.* Notice was given of this order on May 6, 1940, and then on the 17th day of May, 1940, after the plaintiffs had had ten full days' notice, the plaintiffs, by their attorneys, *declined this right to amend,* and failed and refused to plead further.

What could the Trial Court do but enter a judgment

for the defendant? The Trial Court took the only course that could have been taken and entered such judgment. The plaintiffs appealed to this court. They made, served and filed their assignments of error, consisting of three in number, and the only complaint that is made in those assignments is that the Trial Court erred is sustaining the defendant's demurrer, and erred in dismissing the plaintiffs' complaint and in rendering judgment for the defendant. There is not one word that could be construed into a complaint relative to any denial of an opportunity for amending the complaint. The appellants did not *assign* any error committed by the Trial Court relative to an amendment of the complaint, because the Trial Court did not *commit* any error. Even in this court the appellants have not claimed any right as yet to amend their complaint.

It has been held that the error of a trial court, if one is made, must be pointed out in this court by assignment, and that assignments not argued will be deemed waived, and that assigning a wrong reason for a correct rule is a harmless error, and that the only questions before an appellate court on appeal are those raised by assignments of error and presented in appellant's brief.

First National Bank vs. Brown, 20 Utah, 85; 57 Pac. 877 (1899).

Advance Rumley-Thresher Co. vs. Stohl, 75 Utah, 124; 283 Pac. 731 (1929).

In this Stohl case the lower court had refused to admit evidence to support one of the defenses alleged by the defendant, and of this matter this Court unanimously said:

> "We are now asked to determine the question whether in the event of reversal the defendant may not urge this defense. This we may not do. The question was not presented by any assignment of error, nor is it discussed in the briefs."

Cornia vs. Cornia, 80 Utah, 486; 15 Pac. (2d) 631 (1932).

In this case this Court dismissed an appeal because there had been a failure to serve or file in this court assignments of error within the time prescribed by court rule. This court will not search the record for error, and reasons, even when given by a trial court, are after all immaterial in this court if the ruling of the trial court is correct.

Liberty Coal Co. vs. Snow, 53 Utah, 298; 178 Pac. 341 (1919).

In this Snow case Mr. Justice Frick said:

> "That the district court, in its rulings at the trial, may not have followed all of the foregoing reasons, and may have indulged in others, is wholly immaterial. In view of the conceded facts the only question here is whether the judgment is right as a matter of law."

A party cannot complain that leave to amend was not granted when he did not ask for it.

Adeline Mfg. Co. vs. Phillips, 118 Mich. 162; 76 N. W. 371; 42 L. R. A. 531 (1898).

In this Michigan case it was held that the complainant should have been given an opportunity to amend his bill if he desired it, but the Court said:

> "We cannot assume that he did, and the record does not show that he asked for it, so far as we are advised."

(In the case at bar the record affirmatively shows that the plaintiffs declined the right to amend given by the Court.)

This is an action at law, not a suit in equity. The jurisdiction of this Court is exclusively appellate in such a case. (Section 4, Art. VIII, Utah State Constitution.)

> "In equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on question of law alone." (Sec. 9, Art. VIII, Utah State Constitution.)

The right to amend was one to be determined by the District Court in the exercise of its judicial discretion. The District Court determined and granted that right to amend in the case at bar, and the plaintiffs refused and declined that right. Even if the District Court had abused its discretion and denied that right, this Court has no power to review that ruling unless its appellate power is invoked by the appellant. That power has not been invoked. There is no assignment of error and there could not be because the District Court allowed the plaintiffs a right to amend.

Even the District Court could not have granted the plaintiffs relief from their deliberate act had the District Court been petitioned to exercise such power.

Section 104-14-4 of the Revised Statutes of Utah, 1933, grants a broad discretion to a district court in granting relief in furtherance of justice. This section

of the statute grants the broadest discretionary powers to the district court, but they are discretionary with that court, and there is a time limit withing which that court may exercise such discretionary powers. If there is no time, where will litigation end?

"*It is a question of power.*" (104 U. S. 410; 26 L. Ed. 797 (1881).

In the first portion of the section power is granted to allow amendments to pleadings and proceedings; for the correction of mistakes and for the enlargement of time, and for the filing of pleadings and motions after the time limited by the code has expired. It then provides:

> "and may also, upon such terms as may be just, relieve a party or his legal representative from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect; and when, for any reason satisfactory to the court or the judge thereof, the party aggrieved has failed to apply for a new trial or other relief sought during the term at which such judgment, order or proceeding complained of was taken, the court, or judge thereof in vacation, may grant the relief upon application made within a reasonable time, not exceeding ninety days after the making or occurrence of the judgment, order or other proceeding sought to be relieved from. But in no event can a motion for new trial be made after the time for appeal has passed." Section 104-14-4. (See Amd. 1939. Chapter 121.)

Then follows a provision providing that nothing but the actual taxable costs of the action accruing on and

after the default shall be imposed by the court under the provisions of this section authorizing the imposition of terms as a condition upon which relief is granted.

Peterson vs. Crosier, 29 Utah, 235; 81 Pac. 860 (1905).

In this case neither the defendant nor his attorney apeared at the trial. The case was tried in their absence and a verdict of $2500 was rendered in favor of the plaintiff and against the defendant. Judgment was entered in accordance with the verdict on June 3, 1904. On October 31, 1904, within the time for appeal as then provided, the defendant served and filed a motion to vacate the verdict and all proceedings subsequent thereto upon the ground that the same was taken against him through his mistake and excusable neglect. Relief in furtherance of justice was sought under the statute then known as Section 3005 of the Revised Statutes of 1898. That section is now, with no amendment material here, Section 104-14-4 of the Revised Statutes of 1933. Sec. 104-14-4, Chapter 121, Laws 1939.

Bronson vs. Schulten, 104 U. S. 410; 26 L. Ed. 797 (1881).

This Court, speaking through Mr. Justice McCarty, said:

> "In order to bring a case within the foregoing provision of the statute, the moving party must show that he has used due diligence to prepare and appear for trial, and present his defense, and that he was prevented from doing so because of some accident, misfortune, or combination of circumstances over which he had no control. If, how-

ever, the 'record discloses mere carelessness, lack of attention, or indifference to his rights on the part of applicant or his counsel, he cannot expect an opportunity to redeem the past. If the party's negligence is without excuse or justification, he must abide the consequences.' " (Citing authorities.)

In the case at bar there was no negligence on the part of the attorneys for the plaintiffs. They were present, and in the language of the judgment they failed and refused to amend their complaint, and the judgment is analogous to one as entered upon default.

"The pleader is not required to amend but may stand on his pleading and suffer judgment."

Ellis Co. vs. Brannen, 161 Ala. 573; 49 So. 1034 (1909).

On appeal he has a right to claim that the ruling in sustaining the demurrer was erroneous, but surely he has no right to claim an error on the part of the trial court for not allowing him to amend when the trial court did allow him to amend and he refused to amend. Then again, we are confronted with the rule of law briefly stated as: "Right Ruling for Wrong Reason."

"A right ruling will be sustained though based on a wrong reason."

Liberty Coal Co. vs. Snow, 53 Utah, 298; 178 Pac. 341 (1919) supra.

Jeffries vs. Fraternal Society, 135 Iowa, 284; 112 N. W. 786 supra.

Billesbach vs. Larkey, 161 Cal. 649; 120 Pac. 31 (1911) supra.

Burke vs. Maguire, 154 Cal. 456; 98 Pac. 21 (1908) supra.

Fields vs. Kincaid, 67 Colo. 20; 184 Pac. 832 (1919).

Board vs. First State Bank, 77 Okla. 291; 188 Pac. 115 (1920).

Perkins vs. Peterson, 67 Colo. 101; 185 Pac. 660 (1919).

Dunkin vs. Galloway, 75 Okla. 125; 181 Pac. 939 (1919).

Babcock vs. Engel, 58 Mont. 597; 194 Pac. 137 (1920).

Ex Parte Hunter (Cal.) 195 Pac. 75 (1921).

British-American Ins. Co. vs. Wilson, 77 Conn. 559; 60 Atl. 293 (1905).

Lewiston vs. Stoddard, 78 Conn. 575; 63 Atl. 621 (1906).

As late as 1920 it was held by this court that "although the court may believe a decree to be erroneous in a particular matter, it has no alternative but to affirm the decree where such matter is not presented for review."

Big Cottonwood Tanner Ditch Co. vs. Shurtliffe, 56 Utah 196, 189 Pac. 587 (Pages 591, 593) (1920).

Up until the announcement of the decision in this case it has been generally supposed by the bench and the bar, by lawyers of long and short experience, that when a demurrer to the plaintiff's complaint has been

sustained, and when the plaintiff has been granted the right to amend and when that plaintiff has refused to exercise that right, the burden was upon the plaintiff for the result of any mistake that such party or the counsel might make in declining to amend. Competent lawyers often have taken leave to amend their complaint for no other purpose than to check over the facts with the allegations contained in the complaint.

As was at one time said by Justice Lamm of the Supreme Court of Missouri: (10 L. R. A. (N. S.) 145)

> "The formulation of legal principles is not for a day or for one case. Such principles are for general use in like cases until overthrown."

Shall the rule of practice established under Utah's Code of Civil Procedure since that code first came into being be at this time and in this case destroyed and annulled? Shall civil procedure be made more uncertain? Shall the law as it exists in every state from Connecticut to California and from Florida to Montana be disregarded? Shall this Court take jurisdiction to determine a question that is not before the Court for review? THERE MUST BE ERROR TO JUSTIFY REVERSAL OF A JUDGMENT.

Sutter vs. San Francisco, 36 Cal. 112 (1868).

> "When a demurrer to a complaint is properly sustained, with leave to amend, and the plaintiff declines to do so, the judgment will not be reversed on appeal in order to allow an amendment. THERE MUST BE ERROR TO JUSTIFY A REVERSAL OF A JUDGMENT." (Par. 3 of syllabi.) (Caps ours.)

Quotation from opinion:

> "The appellant, however, asks that the case be sent back, with leave to amend. *But this we cannot do.* The Court granted leave to amend, so he had the opportunity, but declined to embrace it. He chose to stake his case upon the demurrer, and final judgment was accordingly entered upon it. The appeal is from the judgment, and we find no error to vitiate it. We hold that the Court committed no error, so far as the record shows its action, and that the judgment is in all respects legal. We cannot, therefore, reverse it, for we find no error to justify such action, and plaintiff cannot now amend, because there is a valid final judgment; and there is nothing more to be done, without first reversing this judgment. It would be an anomaly in legal proceedings to hold the judgment in all respects correct, and then arbitrarily reverse it." (Italics ours.)

Kirby vs. Superior Court, 68 Cal. 404; 10 Pac. 119 (1886).

Lower Court prohibited from allowing amendment to complaint after affirmance of judgment by Supreme Court.

Quotation from opinion:

> "The judgment of this court on appeal has determined that there was no error in the record, and the parties and court *a qua* are alike concluded by it from vacating it and making another case for trial. *The plaintiff should not be thus allowed to speculate or gamble on remedies.*" Italics ours.

But the plaintiffs in this case and their counsel made no mistake in declining to amend. The unalterable facts of record are such that the plaintiffs cannot truth-

fully allege that the award of compensation has been paid by the insurance carrier. This will explain why that allegation was not put in the complaint and why counsel for plaintiffs declined to amend when that right was given by the Trial Court.

There has been attached to this petition and brief Exhibit A, a certified copy of the award of compensation made by the Industrial Commission of this state.

CONTENTION NO. 6

RESPONDENT IS ENTITLED TO COSTS OF THIS APPEAL

This Court has held that complaint is insufficient as against demurrer of defendant, and yet reversed judgment (Ex Gratia). Allegation that award of compensation has been paid was omitted from the complaint either by accident or design. It it was an accident it was due to the negligence of appellants here, plaintiffs below. If truth required the omission, as it appears to have done, then no one is at fault, and the Trial Court will be compelled to once again enter judgment for defendant. Respondent should have costs in any event.

Chaswell vs. Delaware, 56 Fed. 529 (9 C. C. A.; 1893).

Hathaway vs. United Mines Co., 42 Utah, 520; 132 Pac. 388 (1913).

CONCLUSION

In conclusion the respondent respectfully submits that no case can stand alone. This case, when finally decided, must have some effect as a precedent. Having that effect, it is the more important to rest its decision upon

sound and well-established principles. The respondent has based its right for a reconsideration on such principles summarized as follows:

FIRST: Subrogation is not assignment. When Section 42-1-58 provided for subrogation of insurance carrier, that section by so providing did not make rights of action to recover for injury or death assignable; it did not even *transfer* the right of action for death *from* dependents *to* insurance carrier. On the contrary, insurance carrier obtained this right when it had paid the compensation awarded directly from the statute. The result follows that no one can sustain the contention that Section 42-1-58 made any right of action assignable. Assignability is not affected by Section 42-1-58. Survivability is still the sole test of assignability.

SECOND: Insurance carrier as subrogee under Section 42-1-58 acquired no property right; no right capable of inheritance; no right that was capable of assignment.

THIRD: Plaintiffs in their complaint are not seeking to enforce a property right, but rather are seeking to enforce what they allege is their own right to recover damages for wrongful death. They by means of an alleged "waiver and assignment" are seeking to revoke and nullify the election which they made to take compensation.

FOURTH: Insurance carrier could not have become vested with the right of action to recover damages from the third person until that insurance carrier had paid the award in full. Carrier has not paid and could not pay that award in full because of its express terms. There-

fore, the insurance carrier could not assign the right which it did not own. Assignment of a non-existent action is void.

FIFTH: Long and well-established rules of law of a jurisdictional nature preclude this Court from allowing plaintiffs to amend their complaint; even the District Court has no such power after judgment when 90 days time has expired (Section 104-14-4) (Chapter 121, Laws 1939). This is true where a most meritorious showing of mistake, inadvertence, surprise or excusable neglect is made. The reversal of this judgment is contrary to law because no error of any sort can be found in that judgment. A reversal cannot be granted in this case because the Trial Court did not commit any error. In the language of Justice Frick, "the only question here is whether the judgment is right as a matter of law." (53 Utah, 298.) No error committed nor error assigned.

SIXTH: There was no fault committed by counsel for either party either in refusing to amend or in precluding the exercise of that right given by the Trial Court. It is an absolute certainty that respondent was not at fault either as a matter of law or of ethics. Why should it pay costs of appeal, but why should judgment be reversed?

For the reasons herein stated it is submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

MAHLON E. WILSON,
ROBERT C. WILSON,
Attorneys for Respondent.

EXHIBIT A
CERTIFIED COPY OF COMPENSATION AWARD

BEFORE THE INDUSTRIAL COMMISSION OF UTAH

CLAIM NO. 4005

CARL JOHANSON and CLARA JOHANSON, father and mother respectively of Robert Johanson, deceased, Janet Orem, Blaine Orem and Emma Alveretta Johanson, Applicants, vs. ROYAL CRYSTAL SALT COMPANY, and/or LONDON GUARANTEE & ACCIDENT CO., Defendants.	DECISION

In conformity with notice and order of the Industrial Commission of Utah, this matter was duly heard on August 8, 1938 at Tooele City, Utah, the applicants being present and represented by their attorney, Mr. E. LeRoy Shields; Robert A. Burns, Esquire, appearing for the defendants. Sworn testimony was presented and certain stipulations agreed to by the respective parties.

The Commission being advised in the premises, makes the following Findings, Conclusions and Orders:

FINDINGS

On the 3rd day of June, 1938 Robert Johanson, while employed as truck driver, in the course of his regular duties, by the defendant Royal Crystal Salt Company, suffered accidental injury resulting in his immediate death, to-wit: "Was backing truck into loading platform at the Cudahy Packing Company's plant at North Salt Lake, contacted electric current and was electrocuted.

II

On the above date, the defendant Royal Crystal Salt Company was an employer subject to the State Industrial Act, the London Guarantee & Accident Company being its insurance carrier. The wage earned by Robert Johanson on the date of his fatal injury was $5.40 per day, the operation of the Royal Crystal Salt Company's plant being 5 days per week.

III

On the date of his fatal injury, Robert Johanson was one of several children living with his parents, the applicants herein (Carl and Clara Johanson). He was contributing in part to their maintenance and support, said parents being in fact partially dependent upon the decedent Robert Johanson at the time of his injury and death, to the extent and degree of $7.79 per week.

IV

The Commission finds that applicants Janet Orem, Blaine Orem and Emma Alvaretta Johanson were not dependent, in whole or in part, upon the decedent Robert Johanson at the time of his fatal injury.

V

The applicants were represented before the Commission by Mr. E. Le Roy Shields, Attorney at Law, Salt Lake City, Utah, and the reasonable value of such services are $25.00.

CONCLUSIONS

In view of the foregoing Findings, the Commission concludes that Robert Johanson was killed by reason of an accident arising out of or in the course of his employment, while employed by the Royal Crystal Salt Company, and that therefore, the defendants herein should be required to pay compensation to the dependants of said deceased, together with burial expense, as provided by law.

WHEREFORE, IT IS ORDERED, that the Royal Crystal Salt Company and/or London Guarantee and Accident Company pay to the applicants, Carl Johnson and Clara Johanson, of Grantsville, Utah, compensation at the rate of $7.79 per week for a period of six years after the date of fatal injury, payments to begin as of June 4, 1938, all accrued payments to be paid in a lump sum and thereafter once each four weeks, unless otherwise ordered by the Commission.

IT IS FURTHER ORDERED, that the defendants herein pay direct to Mr. E. LeRoy Shields, Attorney at Law, 905 First National Bank Building, Salt Lake City, Utah, the sum of $25.00, deducting said sum from the compensation herein awarded to the applicants.

IT IS FURTHER ORDERED, that the defendants herein pay for the burial of decedent, Robert Johanson, as provided by law.

IT IS FURTHER ORDERED, that in case any party hereto desires to be further heard in these proceedings or to appeal from this Decision, written application for rehearing herein must be filed with the Industrial Commission of Utah within thirty (30) days from the date of mailing a copy of this Decision to said parties, as said date is evidenced by letter of transmittal of the same as shown by the records or files in the office of this Commission.

The Industrial Commission of Utah retains jurisdiction over this case until all proceedings are had and all matters and things done herein to finally dispose of the same according to law.

INDUSTRIAL COMMISSION OF UTAH,
WM. M. KNEER,
O. F. McSHANE,
B. D. NEBEKER,
Commissioners.

I hereby certify the above to be a true and correct copy of decision rendered by The Industrial Commission of Utah on the 22nd day of August, 1938.

CAROLYN D. SMITH,
Secretary.

(SEAL)

Industrial Commission of Utah.